(1)

No. 93-6188-CFX
Status: GRANTED

Title: Roy Heck, Petitioner
v.
James Humphrey, et al.

Docketed:
September 29, 1993

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Rothfeld,Charles

Counsel for respondent: Gutwein,Matthew R.

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1	Sep 29 1993	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Nov 4 1993		DISTRIBUTED. November 24, 1993 (Page 11)
4	Nov 15 1993	P	Response requested -- JPS. (Due December 15, 1993)
5	Dec 15 1993		Brief of respondents James Humphrey, et al. in opposition filed.
6	Dec 23 1993		Reply brief of petitioner Roy Heck filed.
7	Dec 30 1993		REDISTRIBUTED. January 14, 1994 (Page 9)
9	Jan 14 1994		Petition GRANTED.
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10	Feb 18 1994		Joint appendix filed.
14	Feb 28 1994		Brief of petitioner Roy Heck filed.
13	Mar 7 1994		SET FOR ARGUMENT MONDAY, APRIL 18, 1994.(2ND CASE).
11	Mar 8 1994		CIRCULATED.
15	Mar 8 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Seventh Circuit.
16	Mar 14 1994		Record filed.
		*	Original record proceedings United States District Court for the Southern District of Indiana.
17	Apr 4 1994	X	Brief of respondents James Humphrey, et al. filed.
19	Apr 4 1994	X	Brief amici curiae of Arizona, et al. filed.
18	Apr 11 1994	X	Reply brief of petitioner Roy Heck filed.
20	Apr 18 1994		ARGUED.

EDITOR'S NOTE

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No. 93-6188

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROY HECK,

Petitioner,

v.

JAMES HUMPHREY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED

1. Whether a federal court may "recharacterize" a state prisoner's action under 42 U.S.C. § 1983 for money damages as a petition for habeas corpus and, on that basis, require the prisoner to exhaust state habeas corpus remedies before seeking to vindicate his constitutional rights under Section 1983.

2. Whether a federal court that requires exhaustion of a Section 1983 action for money damages on this basis should stay, rather than dismiss, the Section 1983 action pending exhaustion.

RULE 14.1 STATEMENT

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner hereby provides the following names of parties to this proceeding whose names do not appear in the caption:

Robert Ewbank, Attorney
Michael Krinoph, Indiana State Police Investigator

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IN THE
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., infra, 1a-5a) is reported at 997 F.2d 355. The opinion of the United States District Court for the Southern District of Indiana (App., infra, 6a-8a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted in full in the appendix. See Pet. App. 26a.

STATEMENT

This case arises out of a state prisoner's action for damages under the federal civil rights statutes, including 42 U.S.C. § 1983. The district court recharacterized petitioner's Section 1983 damages action as a petition for habeas corpus, and on that basis dismissed the action without prejudice so that petitioner could exhaust state remedies. The court of appeals affirmed, holding that such recharacterization was proper under Seventh Circuit law and that the district court was correct in dismissing, rather than merely staying, petitioner's Section 1983 action. In reaching the latter conclusion, the court of appeals declined to follow the decisions of four other circuits and expressly acknowledged that its decision "creates an intercircuit conflict" (Pet. App. 5a) on an important and "difficult" issue (id. at 3a).

1. Petitioner Roy Heck is presently confined at the Westville Correctional Center in Westville, Indiana. He is serving a fifteen-year sentence after a jury, on July 30, 1987, convicted him of voluntary manslaughter in connection with the death of his wife, Rickie Heck. The Indiana Supreme Court upheld petitioner's conviction over a dissent by Justice DeBruler. Heck v. State, 552 N.E.2d 446, 449 (Ind. 1990) (reprinted at Pet. App. 9a-17a).

The State's case against petitioner was based on circumstantial evidence. Mrs. Heck disappeared on or about January

6, 1986, at a time when she and petitioner had been living apart and were involved in proceedings to dissolve their marriage. Some nine months after her disappearance, Mrs. Heck's body was found buried on petitioner's farm. The pathologist's report initially reported that no cause of death could be determined; later, it was altered to state that Mrs. Heck's jaw was broken and to "theorize[] [that] the probability was that decedent had died as a result of a severe blow to the head." Pet. App. 11a.

At trial, the State presented testimony from Mrs. Heck's neighbors that, on the evening of January 6, 1986, she engaged in a heated argument with another person outside of her trailer home. At trial, a neighbor of Mrs. Heck was permitted to identify petitioner as the unknown participant in the January 6 argument on the basis of his voice. The neighbor's in-court voice identification was based on the police having played, at her request and only one week before trial, a recording of petitioner's voice, which she then identified as the voice she heard on January 6. Pet. App. 13a. The neighbor, who was "from the Philippines" and "had a very limited understanding and use of the English language," also gave conflicting accounts in her deposition and at trial of what she heard during the January 6 argument. Pet. App. 13a-14a. In dissenting from the Indiana Supreme Court's affirmance of petitioner's conviction, Justice DeBruler concluded that the voice identification procedure employed by the Indiana police was "unduly and unnecessarily suggestive" and created "a very

substantial likelihood of irreparable misidentification." Pet. App. 17a.

2. On December 27, 1988, petitioner, proceeding pro se, filed this lawsuit under 42 U.S.C. §§ 1983, 1985(2), 1986 and 1988. Petitioner's complaint named as defendants three persons who participated in the investigation and prosecution of his case: Dearborn County prosecutors James Humphrey and Robert Ewbank, and Michael Krinoph, an investigator with the Indiana State Police. See Pet. App. 20a. Petitioner claimed that defendants "conspired and/or acted in concert" to subject him to "an illegal investigation" of his wife's death, "in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution." Pet. App. 21a. More specifically, petitioner alleged that defendants (1) conducted an illegal search, (2) arbitrarily, unlawfully, and knowingly "destroyed clothing from [his] deceased wife's body which was exculpatory in nature and could have proved [his] innoc[]ence," and (3) "directed * * * an illegal and unlawful v[oi]ce identification procedure [three] times with a potential state witness." Pet. App. 23a. Petitioner's complaint sought compensatory and punitive damages, declaratory relief, interest, costs, and attorneys' fees. Pet. App. 25a. It did not seek invalidation of his conviction or release from prison. Along with his complaint, petitioner filed an application to proceed in forma pauperis. Pet. App. 18a-19a.

3. The district court denied petitioner's request to proceed in forma pauperis and ordered the dismissal of his Section 1983 action. The gravamen of petitioner's Section 1983 claim, the court

explained, was that defendants had "acted improperly in an investigation culminating in his being charged." Pet. App. 7a. Because "the issue he raises directly implicate[s] the legality of his confinement," reasoned the court, the "exclusive means by which he may do this in federal court is through an action for habeas corpus relief, which in turn may be brought only after available state remedies have been exhausted." Pet. App. 7a-8a (emphasis added). See also id. at 8a (stating that "a decision on the merits of the claim presented would be tantamount to determining the legality of a plaintiff's confinement"). Ibid.[1]

4. The Seventh Circuit affirmed. Pet. App. 1a-5a. The court of appeals first agreed with the district court that, under Seventh Circuit precedent, petitioner's civil rights action for damages was properly recharacterized as a petition for habeas corpus. Id. at 3a. Conceding that petitioner was not "explicitly requesting that his conviction be vacated," the court nevertheless explained that

[1] Petitioner also sought but was denied habeas relief in federal court. On June 19, 1990, he filed a petition for relief under 28 U.S.C. § 2254, raising five constitutional claims: (1) insufficient evidence to support a conviction for voluntary manslaughter; (2) use of suggestive voice identification procedure; (3) ineffective assistance of counsel; (4) use of illegally obtained wiretap evidence; and (5) deprivation of a fair trial due to use of hearsay testimony. On January 7, 1991, the district court dismissed the petition without prejudice because petitioner had failed to exhaust his claim that he received ineffective assistance of counsel. Heck v. Richards, No. S90-205 (N.D. Ind.). On January 22, 1991, petitioner filed a second federal habeas petition that was identical but for the omission of the ineffectiveness claim. The district court found that the remaining claims had been exhausted on petitioner's direct appeal, and went on to deny relief. Heck v. Richards, No. S91-40 (N.D. Ind. July 30, 1991). The Seventh Circuit affirmed in an unpublished order. Heck v. Richards, No. 91-3034 (Sept. 28, 1992). Petitioner has never sought post-conviction relief in the Indiana courts.

"regardless of the relief sought," if a state prisoner "is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies * * * ." Ibid. "This is such a case," the court continued, because petitioner "claims that he would not have been convicted had the defendants not violated his constitutional rights." Ibid. "Indeed," the court of appeals added, "if his conviction were proper, this suit would in all likelihood be barred by res judicata." Ibid.

Next, the Seventh Circuit addressed a question that it described as "difficult," namely whether "the suit should have been stayed rather than dismissed lest the plaintiff be prevented by the statute of limitations from refiling it after he exhausts his state remedies." Pet. App. 3a. The court first acknowledged that under this Court's decision in Owens v. Okure, 488 U.S. 235 (1989), the statute of limitations applicable to petitioner's Section 1983 action is that set forth in Ind. Code §§ 34-1-2-2, 34-1-67-1(6), which provide for a two-year limitations period; that the defendants' alleged misconduct occurred in 1987; that the Indiana statute of limitations "is not tolled by a plaintiff's imprisonment"; and that, accordingly, if petitioner "should later refile" his Section 1983 action "after exhausting his state remedies, he will be met by a defense of statute of limitations." Pet. App. 3a. "In these circumstances," the court acknowledged,

"several decisions of other circuits hold that the district court should stay rather than dismiss the suit." Ibid. (citing Jewell v. County of Nassau, 917 F.2d 738 (2d Cir. 1990) (per curiam); Young v. Kenny, 907 F.2d 874 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991); Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987); and Richardson v. Fleming, 651 F.2d 366 (5th Cir. 1981)). The court below specifically declined to follow these decisions, however, because staying rather than dismissing the prisoner's action would "give[] inadequate weight to the policy of the statute of limitations, which is to bar stale suits." Pet. App. 3a.

The court of appeals went on to suggest that if petitioner were to exhaust his state habeas remedies, refile his Section 1983 action, and then encounter a statute-of-limitations defense, he might be able to avoid the time bar by invoking the doctrine of equitable tolling. Pet. App. 3a. The panel acknowledged that under Hardin v. Straub, 490 U.S. 536 (1989), "state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits," and it acknowledged that it had "not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations." Pet. App. 3a-4a.[2] Nevertheless, the court of appeals suggested that if a state-law doctrine of equitable tolling were unavailable, a federal court would be obliged to fashion a federal doctrine of equitable tolling

[2] The court did, however, identify one case in which an Indiana court applied what the Seventh Circuit described as "a form of equitable tolling." Pet. App. 3a-4a (citing Torres v. Parkview Foods, 468 N.E.2d 580 (Ind. Ct. App. 1984)).

to effectuate "section 1983's 'chief goals of compensation and deterrence.'" Pet. App. 4a (quoting Hardin, 490 U.S. at 538-39). The court acknowledged that the Second Circuit had come to precisely the opposite conclusion, holding that a federal doctrine of equitable tolling was not available in such circumstances. Pet. App. 4a (citing Jewell v. County of Nassau, supra).

Finally, the Seventh Circuit proceeded to suggest the content of a federal doctrine of equitable tolling applicable in cases such as this:

> The inquiry will proceed in three stages. First, was Heck's initial failure to exhaust his state remedies excusable because of the subtlety of the distinction between a pure civil rights suit that does not require exhaustion and an ostensible civil rights suit that is also a de facto habeas corpus action and therefore does require exhaustion? Second, if so, did Heck proceed with due diligence to exhaust his state remedies and to file the renewed civil rights suit as soon as possible afterward? In answering both questions the district judge will of course have due regard for the handicaps under which Heck labors by virtue of being an unrepresented prisoner presumably untrained in law. If both questions are answered in the affirmative, a third question becomes relevant -- whether the defendants are likely to be substantially prejudiced in their defense of Heck's suit by the long delay, of which they of course cannot be blamed, in the filing of a suit not barred by the doctrine of exhaustion of state remedies.

Pet. App. 4a. The court "express[ed] no view on the proper answers to these questions in this case," explaining that "that would be premature." Id. at 5a.

Recognizing that its opinion "creates an intercircuit conflict" on the issue of dismissal versus stay, the panel, on its own initiative, circulated its decision to the entire court pursuant to Seventh Circuit Rule 40(f). Pet. App. 5a. Over the

dissenting votes of Judges Cudahy, Ripple and Rovner, the full court decided not to rehear the case en banc. Ibid.

REASONS FOR GRANTING THE PETITION

This case presents two recurring issues of great practical significance: first, whether a federal court may require a state prisoner to exhaust state habeas corpus remedies before litigating his 42 U.S.C. § 1983 claim for money damages; and second, assuming that the answer to the first question is yes, whether the court should dismiss, rather than stay, the prisoner's Section 1983 claim pending exhaustion. Given the enormous volume of prisoner civil rights litigation,[3] it is vitally important that the rules governing cases such as this be clearly established and uniformly applied. In the almost 20 years since the Court has last addressed this area of the law, however, the courts of appeals have "struggled mightily" -- and with a singular lack of success -- to reach consistent results.[4] There are now clear conflicts among the courts of appeals on both issues presented here.

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[3] See 1991 Annual Report of the Director of the Administrative Office of the United States Courts at 179 (Table C-2) (29,645 civil rights actions filed by state prisoners in federal court in year ending September 30, 1992).

[4] Paul Bator, Daniel Meltzer, Paul Mishkin & David Shapiro, Hart & Wechsler's the Federal Courts and the Federal System 1650 (3d ed. 1988). See generally Martin A. Schwartz, The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners, 37 DePaul L. Rev. 85, 87-88 (1988) ("The lower federal court decisions are not surprisingly in disarray, with jurists frequently bemoaning the difficulties and frustrations they encounter in attempting to solve Preiser puzzles.").

By holding that a Section 1983 action for money damages may be recharacterized as a petition for habeas corpus, the court below would force litigants to exhaust state habeas remedies that are wholly incapable of providing the monetary relief they are seeking; not surprisingly, its holding requiring exhaustion cannot be reconciled either with decisions of this Court or with a recent holding of the Second Circuit. And in deciding to dismiss rather than stay petitioner's Section 1983 action -- which will subject the suit to a statute-of-limitations defense upon refiling, will lead to substantial additional litigation, and will prevent the litigation of some meritorious claims -- the Seventh Circuit expressly rejected the conclusions of four other courts of appeals and "create[d] an intercircuit conflict." Pet. App. 5a. Review of the decision below accordingly is warranted.

I. A State Prisoner May Not Be Required To Exhaust State Remedies Before Bringing A Section 1983 Action That Seeks Only Money Damages

In this case, the Seventh Circuit held that petitioner's civil rights action for damages was properly recharacterized as a petition for habeas corpus and, on that basis, subject to the requirement of exhaustion of state remedies set forth in 28 U.S.C. § 2254(b). Pet. App. 3a.[5] Although the decision below recognized that petitioner was not "explicitly requesting that his conviction be vacated," it nevertheless explained that "regardless of the

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[5] The fact that petitioner has included, along with his damages claim, a request for declaratory relief in no way alters the analysis of the recharacterization and exhaustion issue. See Wolff v. McDonnell, 418 U.S. 539, 554-55 (1974).

relief sought," if a state prisoner "is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies * * * ." Ibid. "This is such a case," the court continued, because petitioner "claims that he would not have been convicted had the defendants not violated his constitutional rights." Ibid. In reaching this conclusion, the panel applied settled Seventh Circuit doctrine.

The decision below, however, is flatly inconsistent both with decisions of this Court and with the Second Circuit's decision in Mack v. Varelas, 835 F.2d 995 (1987). What is more, while a number of the other courts of appeals have adopted an exhaustion rule generally similar to that of the Seventh Circuit, most have done so only over vigorous dissents or over the majority's own strong misgivings. Those courts, moreover, have also applied different versions of the exhaustion rule, thereby subjecting state prisoners across the country to different preconditions to having their federal rights determined under Section 1983. And the Seventh Circuit's holding is inconsistent with Congress's intent not to require state prisoners to exhaust state remedies in circumstances such as these. To resolve the conflict with the Second Circuit, and to bring clarity to an extraordinarily muddled area of federal law, further review by this Court is warranted.

A. The Seventh Circuit's Decision To Recharacterize And Require Exhaustion Conflicts With The Decisions Of This Court.

This Court has examined the boundary between habeas corpus and § 1983 in the context of state-prisoner litigation in three cases, all decided in the mid-1970s. See Preiser v. Rodriguez, 411 U.S. 475 (1973); Wolff v. McDonnell, 418 U.S. 539 (1974); Gerstein v. Pugh, 420 U.S. 103 (1975). In discussing the characterization of prisoner claims in those cases, the Court stressed the importance of the type of relief being sought, and it concluded that a state prisoner's Section 1983 claim for damages is immediately cognizable in federal court (and may be pursued simultaneously with a habeas corpus action premised on the same allegations).

Preiser involved a Section 1983 action by state prisoners challenging the calculation of good-time credits by prison authorities. The prisoners "sought injunctive relief to compel restoration of the credits, which in each case would result in their immediate release from confinement in prison." 411 U.S. at 476-77. Explaining that the very essence of habeas corpus is an attack on the "fact or duration" of confinement, the Court ruled that the prisoners' exclusive federal remedy was an action for habeas corpus. Id. at 500. The prisoners' claim, the Court reasoned, "goes directly to the constitutionality of [their] physical confinement itself and seeks either immediate release from that confinement or the shortening of its duration." Id. at 489 (emphasis added). See also id. at 498, 500 (same). Thus, the Court's holding turned on both the nature of the prisoners' claim

(a direct attack on the "fact or duration" of their confinement) and the nature of the relief sought in the lawsuit. In holding that habeas was the sole federal remedy available, the Court stressed the federalism concerns underlying the exhaustion requirement of the federal habeas corpus statute and explained that the more specific provisions of 28 U.S.C. § 2254(b) overrode the broader terms of Section 1983. 411 U.S. at 488-90, 493 n.10.

In Preiser, the prisoners argued that requiring exhaustion of state habeas remedies might extinguish a damages remedy under Section 1983, because a prisoner who lost in the state courts would be barred by res judicata from relitigating the issue in a subsequent Section 1983 suit, and this would be true even if "a federal habeas court had later granted him relief on habeas corpus." 411 U.S. at 493-94. In rejecting that argument, this Court explained:

> The answer to this contention is that the respondents here sought no damages, but only equitable relief -- restoration of their good-time credits -- and our holding today is limited to that situation. If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release -- the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies.

Id. at 494 (emphasis added in part). Preiser thus made unequivocally clear that a claim for damages is, by its very nature, not an attack on the "fact or length" of confinement and is

maintainable in a Section 1983 suit "without any requirement of prior exhaustion of state remedies." Ibid.

This teaching was reaffirmed in Wolff. There, a class of inmates brought suit under Section 1983 for both injunctive relief and damages, contending that (1) prisoner disciplinary proceedings violated due process, (2) regulations concerning inmate mail were unduly restrictive, and (3) the inmate legal assistance program was constitutionally defective. The Court considered each claim separately.

In discussing the plaintiffs' claim that "the rules, practices, and procedures at the [prison] which might result in the taking of good time violated the Due Process Clause of the Fourteenth Amendment" (418 U.S. at 553), the Court took pains to distinguish, at the outset, the various kinds of relief being sought by the plaintiffs: (a) restoration of good time, (b) submission of a plan by the prison authorities for a constitutionally adequate hearing procedure, and (c) damages. "At the threshold," the Court explained, "is the issue whether under Preiser * * * the procedures for depriving prisoners of good-time credits may be considered in a civil rights suit brought under 42 U.S.C. § 1983." 418 U.S. at 554. Preiser, the Court continued, had held "that because the state prisoners were challenging the very fact or duration of their confinement and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus, with the concomitant requirement of exhausting state

remedies." Ibid. (emphasis added) (citation omitted). But Preiser, the Court continued,

> was careful to point out that habeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under § 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody.
>
> The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under Preiser. But the complaint also sought damages; and Preiser expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damages award would not be barred by Preiser; and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

Id. at 554-55 (footnote and citations omitted; emphasis added).

Finally, in Gerstein v. Pugh, 420 U.S. 103 (1975), the Court reaffirmed the critical importance of the type of relief being sought in a prisoner lawsuit in determining whether the suit was properly characterized under Section 1983, habeas corpus, or both. Gerstein was a class action brought under Section 1983 by pretrial detainees who were being held on the strength of prosecutors' informations without a judicial hearing on probable cause. The plaintiffs sought both a declaration that their detention on these terms violated the Fourth Amendment, and an injunction directing

the State of Florida to provide them with a probable-cause determination. The Court observed:

> Respondents did not ask for release from state custody, even as an alternative remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered for the named respondents. Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. Preiser v. Rodriguez, 411 U.S. 475 (1973); see Wolff v. McDonnell, 418 U.S. 539, 554-555 (1974).

Id. at 107 n.6 (citation omitted; emphasis added). Having thus indicated, yet again, that the remedy requested in a prisoner lawsuit is dispositive on the question of characterization, the Court proceeded to decide the Fourth Amendment issue on the merits.

In Preiser, Wolff, and Gerstein, then, the Court plainly instructed that the nature of relief sought in a federal lawsuit filed by a state prisoner is the critical factor in determining whether the lawsuit was properly characterized as a Section 1983 action, a habeas petition, or both. This Court also explained that a damages claim was not an attack on the "fact or length" of confinement and thus could be maintained under Section 1983 "without any requirement of prior exhaustion of state remedies." Preiser, 411 U.S. at 494. The general rule that state remedies need not be exhausted in a Section 1983 action, moreover, was subsequently reaffirmed by this Court in Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982). By holding that a prisoner who is seeking damages must nevertheless pursue a remedy in habeas corpus, and must exhaust state habeas remedies before proceeding in federal court under Section 1983, the Seventh Circuit has simply ignored

the clear import of this Court's decisions. To correct that error, this Court should grant further review.

B. The Courts Of Appeals Are In Disarray On Whether A State Prisoner Must Exhaust State Remedies Before Bringing A Section 1983 Action

1. In addition to being irreconcilable with this Court's decisions, the decision below is in clear conflict with the Second Circuit's holding, in Mack v. Varelas, 835 F.2d 995 (1987), that the nature of the relief sought by a state prisoner in a Section 1983 action determines whether the lawsuit may proceed under Section 1983 without prior exhaustion of state remedies. There, the Second Circuit held that a prisoner's Sixth Amendment claim for damages against law enforcement officials -- based on their alleged failure to comply with a court order and produce a witness at his trial -- could not be maintained in a habeas proceeding, but rather only in an action under Section 1983. Reasoning that any damages suffered by Mack were "dependent on a determination of the invalidity of his conviction," the trial court had recharacterized the complaint as a habeas petition and ordered dismissal for failure to exhaust state remedies. 835 F.2d at 997. In rejecting the trial court's recharacterization, the Second Circuit relied on the above-quoted language from Preiser, explaining that "a civil rights action for damages, insofar as it does not also seek to void or shorten the term of imprisonment, is not a challenge that should be made by means of a habeas petition." Id. at 998. See also

ibid. ("Mack's complaint is a civil rights complaint and is not properly characterized as a habeas petition.").[6]

The Second Circuit's approach makes eminent sense. As that court explained, a prisoner's claim for damages -- even if based on an allegation that purportedly "implicates" the legality of his conviction -- is legally and logically distinct from any claim for release:

> Were the present claim essentially a habeas petition, it would be mooted if Mack prevailed on appeal from his conviction; but in fact if Mack were to prevail on that appeal and he were then retried and acquitted, his present claim would not be mooted. * * * Nor would an affirmance of Mack's conviction necessarily negate the basis for his claim for damages, for * * * it is likely that the state appellate court will not reach the question of the propriety of the action or inaction by the sheriffs.

835 F.2d at 998.[7]

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[6] Although the Second Circuit in Mack concluded that "[t]reatment of the complaint as a petition for habeas corpus was * * * not proper, and the case should not have been dismissed for lack of exhaustion" (835 F.2d at 998-99), it concluded that postponement of adjudication (and a stay of the action) was appropriate under the doctrine of abstention, because Mack's direct appeal was still pending at the time the court of appeals rendered its decision and because "one possible outcome of the state court proceedings could negate an essential element of Mack's claim." Id. at 997, 999.

[7] Consistent with Mack, the Second Circuit has in several other cases narrowly construed the boundaries of habeas corpus vis-a-vis Section 1983. See Abdul-Hakeem v. Koehler, 910 F.2d 66, 69 (2d Cir. 1990) (prisoner seeking transfer could sue under Section 1983 because he was not seeking release from confinement itself); Williams v. Ward, 556 F.2d 1143, 1150 (2d Cir.) (Friendly, J.) (prisoner seeking new parole hearing but not requesting release could sue under Section 1983 even though "the relief sought may improve [the prisoner's] chances for parole"), cert. dismissed, 434 U.S. 944 (1977).

That reasoning is squarely applicable here. Petitioner's claim seeks damages for the infringement of his constitutional rights and for time spent wrongfully in jail; that claim will not be satisfied (much less mooted) if petitioner gains his release. Under Mack, then, had petitioner brought his Section 1983 lawsuit in the Second Circuit, his constitutional claims for damages would not have been subject to judicial "recharacterization" as a petition for habeas corpus. There is no reason why prisoners confined in Illinois, Indiana, and Wisconsin should be required to exhaust state habeas remedies whereas those in New York, Vermont, and Connecticut are exempt from that requirement.

2. On the other hand, a number of other courts of appeals, like the Seventh Circuit in this case, apply rules both permitting the judicial recharacterization of Section 1983 damages claims filed by state prisoners where those claims somehow "implicate" the legality of the underlying conviction, and requiring such claimants to exhaust state remedies. See, e.g., Hamlin v. Warren, 664 F.2d 29 (4th Cir. 1981), cert. denied, 455 U.S. 911 (1982); Meadows v. Evans, 550 F.2d 345, 349 (5th Cir.) (en banc) (aff'g per curiam, 529 F.2d 385 (1976)), cert. denied, 434 U.S. 969 (1977).[8] A

[8] Those courts disagree among themselves, however, about the scope of the required exhaustion. In the Fifth Circuit, for example, a state prisoner whose Section 1983 action is recharacterized as a habeas petition is required to exhaust not only state, but also federal habeas remedies. See Richardson v. Fleming, 651 F.2d 366, 375 (5th Cir. 1981) (directing prisoner to exhaust not only state remedies but also "federal habeas corpus remedies"); Grundstrom v. Darnell, 531 F.2d 272, 273 (5th Cir. 1976) (per curiam) (Section 1983 damages claims could not proceed until prisoner completed "habeas corpus challenge of the conviction pursuant to 28 U.S.C.A. § 2254"). In the Seventh Circuit, as in

remarkable number of these decisions, however, have been issued over sharp dissents. See Hamlin, 664 F.2d at 33-36 (Winter, C.J., dissenting); Meadows, 550 F.2d at 349 (Tjoflat, J., joined by Tuttle, Goldberg, and Godbold, JJ., concurring in part and dissenting in part) (stating that Wolff and Preiser "expressly" and "unambiguously" "laid to rest" the notion that exhaustion doctrine applies in Section 1983 damages suits). See also Fulford v. Klein, 529 F.2d 377, 383 (5th Cir. 1976) (Tuttle, J., concurring in part and dissenting in part) (criticizing majority's rule as "contrary to the language and reasoning of the Supreme Court in [Wolff and Preiser]"), aff'd en banc, 550 F.2d 342 (1977).[9]

Indeed, even those courts that have recharacterized Section 1983 damages claims as actions for habeas relief have expressed serious reservations about whether such a rule can be squared with this Court's decisions. The Eleventh Circuit, for example, has applied an exhaustion requirement, but only because it was bound to follow decisions of the former Fifth Circuit. Gwin v. Snow, 870

many other circuits, exhaustion of state habeas remedies alone is required.

[9] In a series of Eighth Circuit decisions involving challenges to the conditions of confinement or to the denial of good time credits, various judges likewise have argued that Preiser and Wolff mandate a relief-based distinction between Section 1983 and habeas corpus. See Bressman v. Farrier, 900 F.2d 1305, 1309 (8th Cir. 1990) (Heaney, J., concurring and dissenting) (requiring exhaustion of Section 1983 damages claims is "contrary to congressional intent" and "inconsistent with decisions of the United States Supreme Court"), cert. denied, 498 U.S. 1126 (1991); Jones v. Smith, 835 F.2d 175 (8th Cir. 1987) (McMillian, J., dissenting); Offet v. Solem, 823 F.2d 1256, 1261 (8th Cir. 1987) (Arnold, J., dissenting) (majority's holding is "based upon a completely untenable reading of Supreme Court opinions"); ibid. ("I see no other way to read [Preiser]").

F.2d 616 (11th Cir. 1989).[10] In Gwin, the Eleventh Circuit analyzed Preiser and Wolff and concluded that, under those decisions, "the requested relief is the dispositive criterion for determining whether an action can lie under section 1983." Id. at 622; id. at 626 (same). "To the extent that [the Fifth Circuit's] decisions do not allow claims under section 1983 for relief which would not reduce a prisoner's confinement," the Eleventh Circuit declared, "such decisions impermissibly conflict with the Supreme Court's decisions." Id. at 623 (emphasis added).

The Ninth Circuit expressed similar misgivings in Young v. Kenny, 907 F.2d 875 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991), which required exhaustion of a damages claim based on the denial of jail time credits.[11] Writing for the panel, Judge

[10] Gwin is itself inconsistent with a previous Eleventh Circuit decision. Wahl v. McIver, 773 F.2d 1169, 1171 n.1 (11th Cir. 1985) (per curiam) ("Although [the prisoner] complains of the manner in which his conviction was obtained, this suit was properly treated as coming solely under section 1983 * * * [because the] prisoner does not ask for reversal of his conviction * * * .").

[11] This Court denied petitions for certiorari in Young and in Bressman v. Farrier, supra, over the dissenting votes of Justices White and O'Connor. See Bressman, 498 U.S. 1126, 1127 (1991) (stating that "[b]ecause of the confusion and divergence of opinion these issues have generated in the Courts of Appeals, and the fact that this Court has not ruled definitively upon the issues presented," petitions should be granted). Significant differences in the cases, however, make this one a far stronger candidate for review. Young and Bressman involved a different characterization issue from that presented here -- namely whether a prisoner's claim for damages based on the denial of sentence credits (Young), or good-time credits (Bressman), is subject to the exhaustion requirement. Moreover, the petitioner in Young erroneously conceded that there was no division of authority on the characterization issue. See No. 90-5854 Petition for Certiorari, at 7-8 & n.2; 498 U.S. at 1127. As explained in text, however, that concession disregarded the Second Circuit's decision in Mack. Furthermore, the respondents in Young argued that the plaintiff had

Kozinski there explained that the court was "acutely aware" that language in Wolff "appears to conflict with the rule we have just adopted." Id. at 877. See also ibid. ("we * * * are unable to come up with a principled way of distinguishing Wolff"). In fact, the panel in Young explained that it would "feel bound to follow Wolff" and thus to decline to require exhaustion of a state prisoner's damages claim "were it not for a brief excursion made by the Supreme Court at the end of its opinion" in Tower v. Glover, 467 U.S. 914 (1984). 907 F.2d at 877. The Tower dictum, however, has no relevance to the issue of exhaustion.[12]

In all, then, there is a pervasive confusion and uncertainty among the courts of appeals on the propriety of requiring exhaustion. Further review by this Court -- no matter what the ultimate outcome on the merits -- accordingly is necessary to bring clarification and uniformity to an important area of the law.

in fact sought not only damages but also injunctive relief. See No. 90-5854 Br. in Opp. at 9-10.

[12] In Tower, this Court held that "public defenders are not immune from liability in actions brought by a criminal defendant against state public defenders who are alleged to have conspired with state officials to deprive the § 1983 plaintiff of federal constitutional rights." 467 U.S. at 916. At the end of the opinion, the Court added this observation: "We * * * have no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." Id. at 923 (emphasis added). This comment, which simply reserves judgment on a different issue (the court's duty to abstain rather than the litigant's obligation to exhaust) hardly can be said to impliedly overrule Wolff.

C. The Decision Below Is Erroneous

Finally, it of course also bears emphasis that the decision to recharacterize petitioner's Section 1983 action and to require exhaustion on that basis is, in several respects, incorrect. To begin with, it cannot be reconciled with the available evidence of Congress's intent on the issue of exhaustion.[13] Section 2254(b) expressly excludes from the exhaustion mandate claims for which "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective," thus suggesting that Congress intended to excuse state prisoners from making futile efforts to obtain damages in state post-conviction proceedings. 28 U.S.C. § 2254(b).[14] What is more, Section 1997e of the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), 42 U.S.C. § 1997e, permits states to require exhaustion of state remedies prior to initiation of a Section 1983 action by a state prisoner -- but only in specified

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[13] As this Court has repeatedly recognized, "legislative purpose * * * is of paramount importance in the exhaustion context because Congress is vested with the power to prescribe the basic procedural scheme under which claims may be heard in federal courts." Patsy v. Florida Bd. of Regents, 457 U.S. 496, 501 (1982); see also McCarthy v. Madigan, 112 S. Ct. 1081, 1086 (1992).

[14] Relying on this exception, federal courts have declined to order exhaustion of state remedies where the only remedy sought in the federal petition is unavailable under state law. See, e.g., Brown v. Estelle, 530 F.2d 1280, 1284 (5th Cir. 1976) (prisoner under indictments on other charges need not exhaust state remedies where Texas courts could provide only release, but not a speedy trial on pending charges); Mott v. Dail, 337 F. Supp. 731, 731-32 (E.D.N.C. 1972) (prisoner seeking credit on sentence for time served need not exhaust state remedies where North Carolina courts could not provide this form of relief), appeal dismissed, 473 F.2d 1973 (4th Cir. 1973).

circumstances that are not present here. See Pet. App. 26a. As this Court has repeatedly recognized, CRIPA is strong evidence that Congress intended exhaustion to be required in Section 1983 actions brought by state prisoners only in circumstances covered by the statute -- and not otherwise.[15] See also Bressman v. Farrier, 900 F.2d 1305, 1311-14 (8th Cir. 1990) (Heaney, J., concurring and dissenting), cert. denied, 498 U.S. 1126 (1991).

Nor can the rule of recharacterization and exhaustion be justified of the ground advanced by the court below. The Seventh Circuit's view that exhaustion is necessary because, if petitioner "won his [Section 1983] case[,] the state would be obliged to release him" (Pet. App. 3a), rests on a misunderstanding of the applicable rules of issue preclusion. Even if petitioner were to prevail on his Section 1983 damages claims against the three governmental officials sued in their individual capacities in his complaint, petitioner could not invoke the issue-preclusive effect of that ruling against the State of Indiana in later Indiana

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[15] See McCarthy v. Madigan, 112 S. Ct. at 1089 (in declining to require federal prisoners to exhaust administrative remedies prior to bringing Bivens actions, indicating that "[w]e find it significant that Congress, in enacting Section 1997e, stopped short of imposing a parallel requirement in the federal prison context"); Patsy v. Board of Regents, 457 U.S. at 509 (stating that "[i]mplicit" in Congress's decision "to adopt the limited exhaustion requirement of § 1997e" is "Congress' conclusion that the no-exhaustion rule should be left standing with respect to other § 1983 suits."). In Patsy, moreover, this Court went further and explained that Section 1997e's "detailed scheme is inconsistent with discretion to impose, on an ad hoc basis, a judicially developed exhaustion rule in other cases." 457 U.S. at 511; id. at 508 ("A judicially imposed exhaustion requirement would be inconsistent with Congress's decision to adopt § 1997e and would usurp policy judgments that Congress has reserved for itself.").

proceedings for post-conviction relief. See Young v. Kenny, 907 F.2d at 876; Rule 1, §§ 2, 4(a), 9(d), 12(c), 12(f), Indiana Rules of Post-Conviction Remedies (Burns 1993). It is elementary that collateral estoppel, or issue preclusion, may only be asserted only against a party that "litigated and lost in an earlier action." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329 (1979).[16] Accordingly, there is no risk here that the habeas exhaustion rule of Section 2254(b) will be circumvented through the operation of res judicata.[17]

In sum, the reasoning employed by the Seventh Circuit in ordering recharacterization and exhaustion of petitioner's damages claims is fundamentally flawed. There is no good reason to force petitioner to initiate against a different defendant a time-consuming state procedure that is incapable of providing the only relief he is seeking -- damages. Review of the judgment below accordingly is in order.

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[16] See Restatement (Second) of Judgments § 36 (1982) (party to be precluded in the second action must have appeared in the same capacity in the first action); Kentucky v. Graham, 473 U.S. 159, 167-68 (1985) ("A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him.").

[17] Nor is the exhaustion requirement justifiable on the ground that the prisoner suing for damages under Section 1983 "in fact" desires his release. See McCarthy v. Madigan, 112 S. Ct. 1081, 1091 (1992) (courts "cannot presume, as a general matter, that when a litigant has deliberately forgone any claim for injunctive relief and has singled out discrete past wrongs, specifically requesting monetary compensation only, that he is likely interested in 'other things'"); Hamlin v. Warren, 664 F.2d 29, 33 (4th Cir. 1982) (Winter, C.J., dissenting) (pointing out that plaintiff "was never interrogated on his motives").

II. If A Section 1983 Plaintiff Must Exhaust State Remedies, The Section 1983 Action Should Be Stayed, Rather Than Dismissed, In The Interim

Wholly apart from the propriety of the court of appeals' decision to require exhaustion of state remedies, its decision to dismiss rather than stay petitioner's Section 1983 action pending exhaustion "creates an intercircuit conflict," as the court below itself expressly acknowledged. Pet. App. 5a. But the holding below does more than "disagree" with the published decisions of seven other courts of appeals (id. at 3a) on the "difficult question" presented here (ibid.): the Seventh Circuit's holding that a Section 1983 action should be dismissed pending exhaustion will preclude the assertion of meritorious constitutional claims and create an additional layer of litigation in an already over-litigated area. Because that holding also is inconsistent both with decisions of this Court and with the manifest congressional intent, further review is warranted. Indeed, this issue is of enormous practical importance and warrants the Court's consideration even if it believes that review of the precedent question -- whether exhaustion is required -- is unnecessary.

A. The Decision Below Conflicts With The Holdings Of Other Courts Of Appeals

1. At the outset, the existence of a conflict in the circuits on this issue is undeniable, as the court below frankly acknowledged. The court of appeals itself recognized that the Second, Fifth, Eighth, and Ninth Circuits have held that dismissal of a Section 1983 claim is inappropriate in the circumstances of this case because it exposes the claimant to the risk that his

damages action, when later refiled, will be deemed barred by the statute of limitations. Pet. App. 3a (citing Jewell v. County of Nassau, 917 F.2d 738 (2d Cir. 1990) (per curiam); Young v. Kenny, 907 F.2d 874 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991); Offet v. Solem, 823 F.2d 1256 (8th Cir. 1987); and Richardson v. Fleming, 651 F.2d 366 (5th Cir. 1981)). In addition, the Third, Fourth, Sixth, Tenth, and Eleventh Circuits have reached the same result. Prather v. Norman, 901 F.2d 915, 919 (11th Cir. 1990); Feaster v. Miksch, 846 F.2d 21, 24 (6th Cir.), cert. denied, 488 U.S. 857 (1988); Harper v. Jeffries, 808 F.2d 281, 285 (3d Cir. 1986); Hamlin v. Warren, 664 F.2d 29, 32 (4th Cir. 1981), cert. denied, 455 U.S. 911 (1982); Smith v. Macy, 1992 U.S. App. LEXIS 1930 (10th Cir. Feb. 5, 1992) (unpublished disposition).

The analysis used by the Ninth Circuit in Young is typical. There, the court of appeals vacated the district court's order dismissing a prisoner's Section 1983 action and remanded for entry of a stay. Writing for the court, Judge Kozinski explained that dismissal "could be an unnecessarily harsh method of resolving the tension between section 1983 and the habeas exhaustion requirement" because exhaustion "may take years to complete" and "it is not farfetched to contemplate that a prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim." 907 F.2d at 878. "[I]t would hardly promote the goals of the Civil Rights Act of 1871," the Ninth Circuit added, "to twice deny prisoners a federal forum for section 1983 complaints, once for being too early and again for being too late."

Ibid. Accord, e.g., Jewell, 917 F.2d at 740-41 (vacating order of dismissal and remanding for entry of stay, since dismissal "would work a time-bar to reassertion of the § 1983 claim"); Offet, 823 F.2d at 1261 (reversing dismissal and directing district court to enter stay).[18]

As the court below recognized, that is precisely the danger here. See Pet. App. 3a-5a. The misconduct alleged in petitioner's lawsuit occurred in 1987; this action was timely filed on December 27, 1988. Under Owens v. Okure, 488 U.S. 235 (1989), the statute of limitations applicable to petitioner's Section 1983 action must be borrowed from Ind. Code § 34-1-2-2, which provides a two-year limitations period for personal injury actions. As the court of appeals further noted, the Indiana statute of limitations "is not tolled by a plaintiff's imprisonment" and, accordingly, if petitioner "should later refile" his Section 1983 action "after exhausting his state remedies, he will be met by a defense of statute of limitations." Pet. App. 3a. In these circumstances, other circuits plainly would have stayed, rather than dismissed, petitioner's Section 1983 action.

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[18] More recently, the Fifth Circuit has held that dismissal, rather than a stay, may be ordered in cases in which the plaintiff would be required to exhaust his remedies under Texas law. Jackson v. Johnson, 950 F.2d 263 (1992) (per curiam). As the court in Jackson explained, Texas adheres to a rule of "habeas abstention" under which state courts will not adjudicate state habeas claims while related federal claims are pending. Id. at 266. Thus, unless a federal court dismisses outright a Texas prisoner's § 1983 claim, the prisoner would never be able to satisfy the exhaustion requirement.

2. Recognizing this problem, the court below concluded that the prospect of a time-bar might be dealt with by invocation of the doctrine of equitable tolling -- in particular, by creation of a federal rule of equitable tolling.[19] For several reasons, however, the court of appeals' suggestion that an equitable tolling doctrine

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[19] The court recognized that, under Hardin v. Straub, 490 U.S. 536 (1989), "state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits." Pet. App. 4a. The court also observed that it had "not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations." Pet. App. 3a. The State of Indiana agreed, in its supplemental brief filed below, that equitable tolling is unavailable under Indiana law in a case such as this one.

While the court of appeals identified Torres v. Parkview Foods, 468 N.E.2d 580 (Ind. App. 1984), as a case in which an Indiana court applied what the panel described as "a form of" equitable tolling (Pet. App. 4a), that decision almost certainly would not apply here. In Torres, the plaintiff mistakenly filed a lawsuit in federal court that was dismissed for lack of diversity. The court held that the statute of limitations was suspended at the time of the federal filing and that a subsequent state action could be initiated outside of the original limitations period. Id. at 583. Torres was based on the Indiana Journey's Account Statute, Ind. Code § 34-1-2-8, which provides that if a plaintiff's lawsuit "fails," a new action may be brought within five years. That statute, however, provides an extension only if the decision in the first action was not on the merits. Vesolowski v. Repay, 520 N.E.2d 433, 435 (Ind. 1988). In Torres, of course, the dismissal for lack of diversity jurisdiction was not on the merits, so the second suit could proceed. But neither Torres nor the Journey's Account Statute speaks to the situation here, where a plaintiff whose case is dismissed must then engage in a full round of collateral litigation in another forum before he can again present his claim. There is no provision in Indiana law for extending the statute of limitations if petitioner seeks post-conviction relief in the state courts and receives a determination on the merits. The court below, however, was not troubled by this point, explaining that "should it turn out that Indiana would not apply equitable tolling principles in the circumstances of the present case, this would be of no significance if, in that event, the federal [tolling doctrine] would be applicable, and we think it would be." Pet. App. 4a.

might be applied here detracts neither from the importance of this case nor from the necessity for review by this Court.

First, application of an equitable tolling rule by the Seventh Circuit means that identically situated litigants in different circuits will be treated dissimilarly. If petitioner's suit had been brought in the Second, Third, Fourth, Fifth, Eighth, Ninth, or Tenth Circuits, he would, upon exhaustion of his state remedies, proceed immediately to the litigation of the merits of his Section 1983 action. In the Seventh Circuit, in contrast, he will have to litigate questions related to the statute of limitations. At best, this means that he will be subjected to a uniquely time-consuming and burdensome round of procedural litigation that is not required by other circuits; at worst, the Seventh Circuit's approach means that petitioner's claim will be time-barred.

Second, the Seventh Circuit's invocation of a federal rule of equitable tolling is itself inconsistent with the Second Circuit's decision in Jewell v. County of Nassau, supra. In Jewell, a prisoner filed a Section 1983 suit one day before expiration of the applicable New York statute of limitations, seeking damages and contending that "he was unlawfully arrested and questioned, his home was illegally searched, and as a result of these actions, he was improperly convicted of manslaughter." 917 F.2d at 739. The district court dismissed the suit pending exhaustion of state remedies because motions collaterally attacking the prisoner's conviction were pending in state court. The Second Circuit reversed. Explaining that New York law did not permit tolling

under the circumstances presented in the case, the court of appeals, relying on this Court's decisions in Board of Regents v. Tomanio, 446 U.S. 478 (1980), and Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975), held that it was bound to follow state-law tolling rules because their application "does not violate" the "policy underlying the federal cause of action." 917 F.2d at 740. On the basis of this analysis, the Second Circuit concluded that dismissal would lead to the prisoner's Section 1983 suit being time barred and, accordingly, that the dismissal was erroneous. The Seventh Circuit itself acknowledged that its holding cannot be reconciled with Jewell, which "reached a different conclusion in a similar case." Pet. App. 4a.

Indeed, as the Second Circuit explained, the creation of a federal equitable tolling rule for use in Section 1983 litigation is in significant tension with this Court's decisions. On at least three occasions the Court has specifically declined to substitute a federal for a state tolling rule in a Section 1983 action, cautioning against "unravel[ing] state limitations rules" that apply to federal causes of action. Hardin v. Straub, 490 U.S. 536, 539 (1989). See id. at 543-44; Chardon v. Fumero Soto, 462 U.S. 650, 655-62 (1983); Tomanio, 446 U.S. at 492.[20] See also Wilson v. Garcia, 471 U.S. 261, 269 (1985); Johnson, 421 U.S. at 463-64.

The court below nevertheless concluded that if Indiana law would not excuse petitioner from compliance with the statute of

[20] The Court also has declined to adopt a federal tolling rule in cases arising under 42 U.S.C. § 1981. See Johnson, 421 U.S. at 466.

limitations, a federal tolling doctrine would have to apply because it would be "essential to the vindication of federal rights." Pet. App. 4a. But while this Court has recognized the possibility that state statutes of limitations and related tolling doctrines might not be used in Section 1983 litigation when their use "would defeat the goals of the federal statute" (Hardin, 490 U.S. at 539), the Court declined to apply that exception in Hardin, Chardon, and Tomanio. The Seventh Circuit offered no persuasive reason why the outcome would be any different in this case. See also Tomanio, 446 U.S. at 488 (explaining that "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation") (internal quotations omitted); Robertson v. Wegmann, 436 U.S. 584 (1978) (applying state survivorship statute even though it precluded continuation of Section 1983 action).

Third, the Seventh Circuit's invocation of equitable tolling cannot be dismissed as a harmless frolic and detour that simply takes an alternative route to the same result (preservation of otherwise time-barred Section 1983 claims) as that reached by the circuits that stay Section 1983 actions pending exhaustion. For one thing, the Seventh Circuit's approach creates an additional layer of wasteful and time-consuming litigation. Resolution of disputes about whether the statute of limitations should be tolled will require the expenditure of very substantial judicial resources: federal courts will first have to examine state tolling rules, which is far from a simple matter (see Chardon, 462 U.S. at

667 (Rehnquist, J., dissenting)), and then (if state law does not recognize tolling) will have to proceed to a fact-specific inquiry into the plaintiff's good faith, the diligence with which the suit was pursued, and the possibility of prejudice to the defendant. See Pet. App. 4a.[21] This inquiry often will be more complex than an examination of the merits.[22]

By the same token, the course taken by the Seventh Circuit, in addition to being longer and rockier than the one charted by other courts of appeals, does not necessarily lead to the same destination. Under the equitable tolling doctrine recognized by the court below, a plaintiff may be time-barred through no fault of his own because delay has prejudiced the defense -- even though the plaintiff acted with due diligence and his failure to exhaust was "excusable." See Pet. App. 4a. If this rule is applied strictly, the Seventh Circuit will bar claims that other courts will permit; if it is applied loosely, the Seventh Circuit will have required a large volume of additional litigation that is to no one's

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[21] Insofar as the court of appeals was concerned that a plaintiff may be inexcusably dilatory in pursuing his claim (see Pet. App. 3a-4a), it failed to recognize that it is within a district court's inherent power, following the issuance of a stay, to take such actions as may become necessary to respond to occurrences in the state court proceedings. Harrison v. NAACP, 360 U.S. 167, 178 (1959); Romany v. Colegio de Abogados de Puerto Rico, 742 F.2d 32, 44 (1st Cir. 1984); New Jersey-Philadelphia Presbytery v. New Jersey State Bd. of Higher Educ., 654 F.2d 868, 887-88 (3d Cir. 1981).

[22] See Cleavinger v. Saxner, 474 U.S. 193, 207-08 (1985) ("the vast majority of prisoner cases are resolved on the complaint alone.")

advantage. In either case, the conflict in the circuits on this point warrants this Court's attention.

B. Section 1983 Suits Should Be Stayed Pending Exhaustion

It should be added that the decision below merits review not only because the circuits are in conflict on the stay versus dismissal issue, but also because the Seventh Circuit's conclusion plainly is incorrect. In circumstances substantially identical to those here, this Court held in Deakins v. Monaghan, 484 U.S. 193 (1988), that staying the Section 1983 action is the proper course. In Deakins, the targets of a criminal investigation by state officials brought suit under Section 1983 seeking the return of records and documents seized during the investigation, compensatory and punitive damages for asserted violations of their constitutional rights, and attorneys' fees. In light of the pendency of a grand jury investigation, the district court abstained under Younger v. Harris, 401 U.S. 37 (1971), and ordered the complaint dismissed.

This Court assumed without deciding that Younger abstention applies to Section 1983 claims for monetary relief and then instructed, in language equally applicable here, that a "District Court has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding." Deakins, 484 U.S. at 202 (emphasis added). Endorsing as "sound" the Third Circuit's rule "requir[ing] a District Court to stay rather than dismiss" such claims, this Court explained that the requirement to stay "allows a parallel state proceeding to go

forward without interference from its federal sibling, while enforcing the duty of federal courts to assume jurisdiction where jurisdiction properly exists." Id. at 202-03 (internal quotations omitted). The Court specifically took note of the risk that, "unless [a district court] retain[s] jurisdiction during the pendency of the state proceeding, a plaintiff could be barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations." Id. at 203 n.7.[23]

As several courts of appeal have recognized, the rationale of Deakins applies with equal force where a prisoner's Section 1983 claim for money damages must be exhausted in the state courts. Prather, 901 F.2d at 919; Feaster, 846 F.2d at 24; Williams v. Hepting, 844 F.2d 138, 144-45 (3d Cir.), cert. denied, 488 U.S. 851 (1988). The risk of forfeiture of legal rights posed by the statute of limitations is the same in both contexts. Petitioner's claim for damages cannot be redressed in Indiana post-conviction proceedings. See Rule 1, § 6, Indiana Rules of Procedure for Post-Conviction Remedies (Burns 1993) (if petitioner is entitled to relief, court "shall enter an appropriate order with respect to the conviction or sentence"). The district court accordingly has the same "unflagging obligation" (Deakins, 484 U.S. at 203, quoting

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[23] A stay under the circumstances presented in Deakins is consistent with the settled rule that courts should stay the action and retain jurisdiction when Pullman-type abstention is appropriate. See American Trial Lawyers Ass'n v. New Jersey Supreme Court, 409 U.S. 467, 469 (1973) (per curiam); Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 512-13 (1972); Zwickler v. Koota, 389 U.S. 241, 244-45 (1967).

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976)) to exercise jurisdiction over petitioner's claims as did the court in Deakins. The panel's decision cannot be squared with the logic of Deakins.

In addition to disregarding the clear import of Deakins, the court below gave no weight to compelling evidence that a stay, rather than dismissal, is consistent with congressional intent. As explained above (see page 23, supra), in enacting CRIPA in 1980 Congress included a limited exhaustion provision that permits a federal court, under certain circumstances, to require a prisoner to exhaust state remedies. 42 U.S.C. § 1997e. Even if a court determines that exhaustion "would be appropriate and in the interests of justice," however, it is authorized by the statute only to "continue such case for a period of not to exceed ninety days in order to require exhaustion." Ibid. (emphasis added). Notably, Congress did not authorize dismissal of prisoner Section 1983 actions subject to CRIPA's limited exhaustion requirement, and indeed it limited the duration of any stay to a period of ninety days. McCarthy v. Madigan, 112 S. Ct. 1081, 1089 (1992). The panel's decision in this case cannot be reconciled with Congress's

intent as reflected in Section 1997e. Cf. id. at 1086 (1992).[24]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 1993

[24] In McCarthy, this Court held that a federal prisoner seeking only money damages in a Bivens action need not first exhaust administrative remedies in the federal Bureau of Prisons (BOP), because BOP remedies could not provide the only relief sought by the prisoner -- damages. In rejecting the exhaustion rule urged by the United States, this Court relied in part on the fact that the government's rule authorized dismissal for failure to exhaust, whereas Section 1997e of CRIPA -- the best evidence of Congress's intent -- permitted only a stay. 112 S. Ct. at 1089. Like the government's rule of exhaustion in McCarthy, the Seventh Circuit's rule of automatic dismissal is contrary to Congress's intent as expressed in CRIPA.

APPENDIX

single component"), *vacated on other grounds*, 153 Ill.2d 1, 178 Ill.Dec. 761, 605 N.E.2d 555 (1992); *see also Hilliard*, 834 F.2d at 1356. Accordingly, a component or part of a system can be an improvement to real property if it is an essential or integral part of the improvement to which it belongs. *Kleist*, 212 Ill.App.3d at 743, 156 Ill.Dec. at 841–42, 571 N.E.2d at 821–22 (citing *Mullis v. Southern Co. Servs., Inc.*, 250 Ga. 90, 94, 296 S.E.2d 579, 584 (1982)). In spite of this line of cases, Hausman's argument focuses upon the shear table alone without asserting facts contrary to Monarch's position that the shear table is an essential component of the entire anneal line. In the absence of facts materially inconsistent with this assessment, then, we find that Monarch's detailed description of the system supports its contention that the shear table was in fact integral to the system as a whole.

Thus our inquiry turns on whether the continuous anneal line was itself an improvement to real property. The *St. Louis* court found its ability to decide the case impaired by the lack of evidence regarding the scope of the project; its cost, size or weight; its method of installation; and the building modifications necessary to accommodate it. However, the record in the case before us is sufficiently detailed to allow us to evaluate the nature of the equipment and the construction process. The anneal line, which was 80 feet tall and more than 150 feet long, was part of a multimillion dollar construction project at Olin. To accommodate the equipment, Olin had to raise the roof of its building 50 feet, remove the floor to allow for new footings and foundations and install water drain and supply lines. The anneal line at issue here was the first strip anneal line to be placed in this particular part of the plant, and it was capable of handling heavier gauge coils than the other lines. Appellee's Supp. App. at 55.

Guided by the language in *St. Louis*, we conclude that the anneal line constitutes more than mere repairs or replacement, and also is a permanent installation that substantially enhances the value of the property by, *inter alia*, allowing Olin to anneal heavier gauge steel. *See St. Louis*, 153 Ill.2d at 4–5, 178 Ill.Dec. at 762, 605 N.E.2d at 556; *Calumet Country Club v. Roberts Envtl. Control Corp.*, 136 Ill.App.3d 610, 91 Ill.Dec. 267, 483 N.E.2d 613 (1985) (stating that an improvement "substantially enhances the value of the property"); *Hilliard*, 834 F.2d at 1354–55 (citing *Calumet Country Club*). The project therefore constitutes an improvement to real property within the meaning of paragraph 13–214 and the terms of that provision prohibit Hausman's suit.

III.

The language of section 13–214 comprehends Monarch's involvement in the construction of the anneal line, and the project itself constitutes an improvement to real property within that statute of repose. As a result, Hausman's cause of action is barred and summary judgment for the defendant was proper. For the foregoing reasons, we AFFIRM the decision of district court.

Roy HECK, Plaintiff-Appellant,

v.

James HUMPHREY, Dearborn County Prosecutor, Robert Ewbank, Attorney, and Michael Krinoph, Indiana State Police Investigator, Defendants-Appellees.

No. 89-1323.

United States Court of Appeals, Seventh Circuit.

Submitted July 24, 1992.

Resubmitted March 1, 1993 *.

Decided July 1, 1993.

Inmate brought § 1983 action against county prosecutor, attorney, and state police investigator, alleging that his state murder conviction was "engineered" in violation of his constitutional rights. The United States District Court for the Southern District of Indiana, James E. Noland, J., dismissed action. Inmate appealed. The Court of Appeals, Posner, Circuit Judge, held that district court properly dismissed, rather than stayed, action for inmate's failure to exhaust state remedies.

Affirmed.

1. Action ⇐68

Federal Civil Procedure ⇐1788.10

District court properly dismissed, rather than stayed, inmate's § 1983 action, alleging that his state murder conviction was "engineered" in violation of his constitutional rights, for his failure to exhaust state remedies; if, after exhaustion, inmate refiled his § 1983 action and was met by statute of limitations defense, he could raise doctrine of equitable tolling. 42 U.S.C.A. § 1983.

2. Habeas Corpus ⇐319.1, 431

If, regardless of relief sought, inmate is challenging legality of state conviction, so that if he won his case the state would be obliged to release him even if he had not sought that relief, suit is classified as "application for habeas corpus" and plaintiff must exhaust his state remedies, on pain of dismissal.

See publication Words and Phrases for other judicial constructions and definitions.

3. Limitation of Actions ⇐1

Policy of statute of limitations is to bar stale suits.

4. Limitation of Actions ⇐104½

Under "doctrine of equitable tolling," person is not required to sue within statutory period if he cannot in the circumstances reasonably be expected to do so.

See publication Words and Phrases for other judicial constructions and definitions.

5. Limitation of Actions ⇐104½

There must be diligence on part of party seeking to invoke doctrine of equitable tolling, and diligence must continue up to time of suit.

6. Federal Courts ⇐425

Statute of limitations applicable to § 1983 claim is borrowed state statute, and state, not federal, tolling provisions apply to state statutes of limitations borrowed for § 1983 suits. 42 U.S.C.A. § 1983.

7. Federal Courts ⇐411

In enacting statute extending state law to govern federal trial under federal civil rights statute when federal civil rights statute is deficient in provisions necessary to furnish suitable remedies, Congress intended that gaps in federal civil rights acts should be filled by state law, but only as long as that law is not inconsistent with federal law and does not defeat chief § 1983 goals of compensation and deterrence. 42 U.S.C.A. §§ 1983, 1988.

8. Federal Courts ⇐427

Body of state statute of limitations tolling law that lacks provision for equitable tolling is inconsistent with provision of complete federal remedy under § 1983 and, thus, is overridden by federal doctrine of equitable tolling when § 1983 plaintiff is required to exhaust state remedies because his claim is in part claim for habeas corpus. 42 U.S.C.A. §§ 1983, 1988.

Kathleen M. O'Laughlin, Keck, Mahin & Cate, Chicago, IL, for plaintiff-appellant.

David M. Wallman, Deputy Atty. Gen., Office of the Atty. Gen., Federal Litigation, Indianapolis, IN, for defendants-appellees.

Before CUMMINGS, POSNER, and MANION, Circuit Judges.

POSNER, Circuit Judge.

[1, 2] This pro se prisoner civil rights suit charges that the defendants engineered the

* After appointment of counsel for the appellant, and receipt of supplemental briefs dealing with the issue of equitable tolling.

plaintiff's conviction for murder by, among other wrongful conduct, the destruction of exculpatory evidence. Compensatory and punitive damages were sought. The plaintiff made no effort to exhaust his state remedies against wrongful conviction, however, and this was, as the district court ruled in dismissing the suit, a fatal omission. If, regardless of the relief sought, the plaintiff is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so. *Viens v. Daniels*, 871 F.2d 1328, 1332 (7th Cir.1989); *Scruggs v. Moellering*, 870 F.2d 376, 379 (7th Cir.1989); *Hanson v. Heckel*, 791 F.2d 93 (7th Cir.1986) (per curiam). This is such a case, as the plaintiff, while not explicitly requesting that his conviction be vacated, claims that he would not have been convicted had the defendants not violated his constitutional rights. Indeed, if his conviction were proper, this suit would in all likelihood be barred by res judicata.

[3] The difficult question is whether the suit should have been stayed rather than dismissed lest the plaintiff be prevented by the statute of limitations from refiling it after he exhausts his state remedies. The defendants' alleged misconduct took place in 1987 and the applicable statute of limitations is only two years and is not tolled by a plaintiff's imprisonment. Ind.Code §§ 34–1–2–2, 34–1–67–1(6); *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); *Bailey v. Faulkner*, 765 F.2d 102 (7th Cir.1985). So if we affirm the dismissal of his suit, and Heck should later refile after exhausting his state remedies, he will be met by a defense of statute of limitations (though, as we shall see, other state tolling doctrines may be available to him). In these circumstances several decisions of other circuits hold that the district court should stay rather than dismiss the suit. *Jewell v. County of Nassau*, 917 F.2d 738 (2d Cir.1990) (per curiam); *Young v. Kenny*, 907 F.2d 874, 878 (9th Cir.1990); *Offet v. Solem*, 823 F.2d 1256, 1258 n. 2 (8th Cir.1987); *Richardson v. Fleming*, 651 F.2d 366, 373 (5th Cir.1981). We respectfully disagree. Such an approach gives inadequate weight to the policy of the statute of limitations, which is to bar stale suits. Should Heck dawdle in exhausting his state remedies, this suit might resume almost a decade after the statute of limitations had expired.

[4, 5] If instead of being stayed, the civil rights suit is dismissed, this sets the stage for confronting the issue of staleness head-on at a time when all the facts bearing on the issue will be known—when the plaintiff, having finally exhausted his state remedies, wishes to resume the civil rights case. When the defendants plead the statute of limitations to a refiled suit, the plaintiff can riposte with the doctrine of equitable tolling—a defense to the defense of statute of limitations. The doctrine is straightforward: "a person is not required to sue within the statutory period if he cannot in the circumstances reasonably be expected to do so." *Central States, Southeast & Southwest Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1376 (7th Cir.1992). It has been applied to a prisoner's civil rights case in which the statute of limitations ran while the prisoner was exhausting his state remedies. *Rodriguez v. Holmes*, 963 F.2d 799, 805 (5th Cir.1992). Rather than giving the plaintiff an automatic extension of indefinite duration, no matter how much his carelessness or sloth may have contributed to the delay in the prosecution of his claim, the doctrine of equitable tolling gives the plaintiff just so much extra time as he needs, *despite all due diligence on his part*, to file his claim. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451–53 (7th Cir.1990). There must be diligence, and the diligence must continue up to the time of suit—you cannot be diligent for a year, and then wait another year to sue.

The cases that we have cited involve, it is true, the *federal* doctrine of equitable tolling. We have not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations. However, *Torres v. Parkview Foods*, 468 N.E.2d 580 (Ind.App.1984), holds that if a plaintiff in good faith files a diversity suit in

federal district court but the suit is later held to be outside the diversity jurisdiction and is therefore dismissed without an adjudication of the merits, the statute of limitations for refiling the suit in state court is tolled. This is a form of equitable tolling, and the point emphasized by the court—that the filing of the suit, albeit in the wrong court, gave the defendant all the notice it needed—is equally applicable here. But should it turn out that Indiana would not apply equitable-tolling principles in the circumstances of the present case, this would be of no significance if, in that event, the federal doctrine would be applicable, and we think it would be.

[6–8] It is true that, although a claim under 42 U.S.C. § 1983 is a federal claim, the statute of limitations applicable to it is a state statute borrowed for the occasion; and the Supreme Court has held that state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits. *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980); *Hardin v. Straub*, 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989). We held the contrary in *Suslick v. Rothschild Securities Corp.*, 741 F.2d 1000, 1004 (7th Cir.1984), but failed even to cite *Tomanio* (*Hardin* hadn't been decided yet). See *Smith v. City of Chicago Heights*, 951 F.2d 834, 840 (7th Cir.1992). Neither *Tomanio* nor *Hardin*, however, dealt with a situation in which a federal tolling doctrine was essential to the vindication of federal rights. Congress, in enacting 42 U.S.C. § 1988 (which provides that in the event that a federal civil rights statute is "deficient in the provisions necessary to furnish suitable remedies ... [state law], so far as the same is not inconsistent with [federal law], shall be extended to and govern" the federal trial), intended that "gaps in federal civil rights acts should be filled by state law," *Hardin v. Straub*, *supra*, 490 U.S. at 538, 109 S.Ct. at 2000, but only "as long as that law is not inconsistent with federal law" and does not defeat section 1983's "chief goals of compensation and deterrence." *Id.* at 538–39, 109 S.Ct. at 2001. *Tomanio* distinguished the case where the federal right "is structured to require previous resort to state proceedings, so that the claim may not even be maintained in federal court unless such resort be had." 446 U.S. at 490, 100 S.Ct. at 1798. That is our case. If we are right that a 1983 plaintiff is not entitled to an indefinite stay while he exhausts whatever state remedies he is required to exhaust because his claim is in part one for habeas corpus, it follows that a body of state tolling law that lacks a provision for equitable tolling is inconsistent with the provision of a complete federal remedy under section 1983 and therefore is overridden by the federal doctrine. *Jewell v. County of Nassau*, *supra*, 917 F.2d at 740, reached a different conclusion in a similar case, but without giving reasons. Its conclusion became the basis for its ruling that the case should be stayed rather than dismissed; the court could see no other way to avoid the bar of the statute of limitations.

We think the dismissal of Heck's suit should therefore be affirmed. When and if he exhausts his state remedies and refiles this suit, and the defendants plead the statute of limitations, the district judge will have to decide whether the elements of equitable tolling have been met. The inquiry will proceed in three stages. First, was Heck's initial failure to exhaust his state remedies excusable because of the subtlety of the distinction between a pure civil rights suit that does not require exhaustion and an ostensible civil rights suit that is also a de facto habeas corpus action and therefore does require exhaustion? Second, if so, did Heck proceed with due diligence to exhaust his state remedies and to file the renewed civil rights suit as soon as possible afterward? In answering both questions the district judge will of course have due regard for the handicaps under which Heck labors by virtue of being an unrepresented prisoner presumably untrained in law. If both questions are answered in the affirmative, a third question becomes relevant—whether the defendants are likely to be substantially prejudiced in their defense of Heck's suit by the long delay, of which they of course cannot be blamed, in the filing of a suit not barred by the doctrine of exhaustion of state remedies. *Seattle Audubon Society v. Robertson*, 931

F.2d 590, 597 (9th Cir.1991). We express no view on the proper answers to these questions in this case; that would be premature. We hold merely that the suit was properly dismissed, rather than stayed. Because this decision creates an intercircuit conflict, we have circulated it to the entire court, pursuant to Circuit Rule 40(f). A majority of the judges voted not to hear the case en banc, Judges Cudahy, Ripple, and Rovner dissenting.

AFFIRMED.

KEY NUMBER SYSTEM

GREEN RIVER BOTTLING COMPANY,
Plaintiff-Counterdefendant-Appellee,

v.

GREEN RIVER CORPORATION and Daniel J. Meyers, Defendants-Counterplaintiffs/Third-Party Plaintiffs-Appellants,

v.

A-BARR SALES, INCORPORATED, Sethness-Greenleaf, Incorporated, Bernard Barc, et al., Third-Party Defendants-Appellees.

No. 92-3577.

United States Court of Appeals, Seventh Circuit.

Argued April 2, 1993.

Decided July 1, 1993.

Soft drink manufacturer brought action against corporation for breach of contract for corporation's purchase of manufacturer's trademark and secret formula. Corporation counterclaimed for trademark infringement. Soft drink distributor brought action against corporation arising from corporation's use of different formula in soft drink. Actions were joined. Parties moved for preliminary injunctions. The United States District Court for the Northern District of Illinois, John A. Nordberg, J., denied corporation's motion. Corporation appealed. The Court of Appeals, Posner, Circuit Judge, held that corporation was not entitled to preliminary injunction barring manufacturer from using trademark and secret formula.

Affirmed.

1. Trade Regulation ⇐620, 621.1

As long as district judge in trademark infringement action was satisfied that corporation seeking preliminary injunction against soft drink manufacturer's use of trademark and secret formula had more than trivial chance of succeeding on the merits, he should have considered irreparable harms to parties of granting and of denying request for preliminary injunction.

2. Trade Regulation ⇐620

Even if corporation had only modest chance of prevailing on merits on its trademark infringement counterclaim against soft drink manufacturer, corporation would have been entitled to preliminary injunction against manufacturer's use of trademark and secret formula if corporation could show that denial of injunction would inflict severe irreparable harm on it while grant of injunction would inflict little or no irreparable harm on manufacturer and soft drink distributor.

3. Trade Regulation ⇐620

Fact that district judge had not determined merits of parties' substantive claims on summary judgment in breach of contract and trademark infringement action did not disentitle any of parties to preliminary injunction.

4. Trade Regulation ⇐621.1

Corporation was not entitled to preliminary injunction with respect to its trademark infringement counterclaim in soft drink manufacturer's action for breach of contract for corporation's purchase of manufacturer's "Green River" trademark and secret formula; corporation was not entitled to formula under contract until it paid full purchase price and, until then, trademark stayed with formula,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

ROY HECK,

Plaintiff,

v.

JAMES HUMPHREY, Dearborn County Prosecutor,
ROBERT EWBANK, Attorney,
MICHAEL KRINOPH, Indiana State Police Investigator; All in their Official and Individual Capacities,

Defendants.

CAUSE NO. NA 88-209-C

JUDGMENT

This cause is before the Court on the complaint of Roy Heck and on his Application to Proceed in Forma Pauperis.

Whereupon the Court, having read and examined such Application and complaint, and having this day made its Entry,

IT IS NOW ORDERED, ADJUDGED AND DECREED that the plaintiff's Application to Proceed in Forma Pauperis is DENIED, that the plaintiff take nothing by his complaint and this cause of action is DISMISSED WITHOUT PREJUDICE.

James E. Noland
JAMES E. NOLAND, Judge
United States District Court

Date: FEB 1, 1989

OBV 36, P 99 4/4 from Judge.

Entered 2-1-

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

ROY HECK, Plaintiff, v. JAMES HUMPHREY, Dearborn County Prosecutor, ROBERT EWBANK, Attorney, MICHAEL KRINOPH, Indiana State Police Investigator; All in their Official and Individual Capacities, Defendants.	)	CAUSE NO. NA 88-209-C

ENTRY

This cause is before the Court on the complaint of Roy Heck and on his Application to Proceed in forma pauperis. The Court, having read and examined such Application and the complaint, and being duly advised, now makes its ruling.

Plaintiff Roy Heck is confined at the Westville Correctional Center. He brings this action against James Humphrey and Robert Ewbank, identified as Dearborn County prosecutors at the time relevant to the complaint, and against Michael Krinoph, an investigator with the Indiana State Police. He alleges that the defendants acted improperly in an investigation culminating in his being charged with killing his wife.

Although it is highly doubtful that the plaintiff's claim contains any merit whatsoever, it is plain that the issue he raises directly implicate the legality of his confinement. The exclusive means by which he may do this in federal court is through an action for habeas corpus relief, which in turn may

be brought only after available state remedies have been exhausted. Preiser v. Rodriguez, 411 U.S. 475, 484 (1973); Hanson v. Heckel, 791 F.2d 93 (7th Cir. 1986); Taylor v. Kavanagh, 640 F.2d 450, 451 (2nd Cir. 1981); Waste Management of Wisconsin, Inc. v. Fokakis, 614 F.2d 138, 142 (7th Cir. 1980); Hanson v. Circuit Court of the First Judicial Circuit of Illinois, 591 F.2d 404 (7th Cir.), cert. denied 444 U.S. 907 (1979).

The Supreme Court has criticized "the continued illogic of treating federal habeas and §1983 actions as fungible remedies for constitutional violations." Allen v. McCurry, 449 U.S. 90, 105n.24 (1980). Recent decisions from our Court of Appeals indicate that in some circumstances a court should refrain from entertaining a civil rights action where a decision on the merits of the claim presented would be tantamount to determining the legality of a plaintiff's confinement until such plaintiff has fully exhausted his state remedies challenging such confinement. Crump v. Lane, 807 F.2d 1394 (7th Cir. 1986); Hanson v. Heckel, 791 F.2d 93 (7th Cir. 1986). That is the situation here, and for the present the broad, general terms of section 1983 must yield to the exclusiveness of the remedy of habeas corpus in federal court. Hanson v. Heckel, 791 F.2d 93 (7th Cir. 1986).[1] Accordingly, the plaintiff's request to proceed in forma pauperis must be denied and the action dismissed without prejudice.

IT IS SO ORDERED this 15 day of February 1989.

James E. Noland

JAMES E. NOLAND, Judge
United States District Court

[1]Because the plaintiff has not alleged and the Court could not establish that he has completed the appellate process in Indiana, construing the present complaint as a habeas corpus petition would also result in dismissal without prejudice for failure to satisfy the exhaustion requirement of the federal habeas statute.

issues of material fact and granting summary judgment to Mende. The trial court focused on whether Alu-span was defective, and Mende urges us that there is no evidence of defect.

[5] Before granting summary judgment, the trial court must find that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. The court must liberally construe all evidence in favor of the non-moving party and resolve any doubt against the moving party. Even if the trial court believes the non-moving party will not succeed at trial, summary judgment is inappropriate where material facts conflict or undisputed facts lead to conflicting inferences. *Yang v. Stafford* (1987), Ind. App., 515 N.E.2d 1157. We review a trial court's grant of summary judgment on this same basis.

[6] The trial court's summary judgment order states:

> A substantial difference exists between a product that is not merchantable or fit for a particular purpose and one that is defective. If it is defective it is highly unlikely it could be merchantable or fit for the particular purpose. However, it could be unmerchantable or unfit for the particular purpose without being defective. With implied warranties it is only necessary that some malfunction exist[s] that makes it unmerchantable or unfit for the particular purpose rather than showing the existence of some specific dereliction by the manufacturer that constitutes a breach. Whereas the express warranty is that the product is free under normal use from substantial defects in material or workmanship, a specific defect must be shown to constitute a breach or warranty.

We disagree with the trial court's interpretation of the express warranty terms "normal use" and "defect."

The facts before the trial court on summary judgment are subject to conflicting inferences. Who would "normally use" this product and for what purpose would they use it? Was Alu-span "defective" within the meaning of the express warranty? The black-letter definition of "defective" suggests that a good may be defective as the result of some sort of imperfection or dereliction, and it may also be "defective" when the product is not fit for the ordinary purposes for which it was sold or used. Black's Law Dictionary 376 (5th ed. 1979).

When the facts are viewed most favorably for non-movant Travel Craft, the express warranty may be interpreted as tantamount to an express warranty of fitness for a particular purpose.

We affirm the trial court's decision on implied warranties. We reverse its grant of summary judgment on the express warranty and remand the case for further proceedings, to be conducted in accord with our holding on the admission of parol evidence.

DeBRULER, GIVAN and DICKSON, JJ., concur.

PIVARNIK, J., not participating.

Roy HECK, Sr., Appellant,

v.

STATE of Indiana, Appellee.

No. 15S00-8711-CR-1081.

Supreme Court of Indiana.

April 6, 1990.

Defendant was convicted in the Dearborn Circuit Court, Anthony C. Meyer, J., of voluntary manslaughter of his wife, and he appealed. The Supreme Court, Givan, J., held that: (1) circumstantial evidence supported conviction; (2) it was not impermissible for witness to ask police to hear tape recording of defendant's voice; (3) evidence concerning defendant's prior assaultive conduct toward wife was properly admitted; and (4) hearsay evidence was not improperly admitted.

Affirmed.

DeBruler, J., dissented with separate opinion.

Dickson, J., concurred in result without separate opinion.

1. Criminal Law ⇐552(1)

Jury's verdict may be based solely upon circumstantial evidence.

2. Homicide ⇐255(2)

Circumstantial evidence supported defendant's voluntary manslaughter conviction in connection with death of his wife; defendant had history of battering his wife, falsely indicated that wife had gone on trip when she disappeared, and left state when police obtained search warrant to search his farm, where wife's body was found, and pathologist, after first indicating that he could not state cause of wife's death due to advanced state of decomposition, later observed that presence of broken jaw could indicate blow to head which might have been severe enough to cause death.

3. Homicide ⇐236(1)

Cause of death may be established by circumstantial evidence.

4. Criminal Law ⇐339.6, 339.10(1)

Witness' request that police allow her to hear tape recording of murder defendant's voice did not constitute impermissibly suggestive identification or taint witness' in-court identification of defendant's voice as voice she heard on night of victim's disappearance.

5. Criminal Law ⇐742(1)

Witness' testimony concerning conversation she heard on night murder victim disappeared—witness identified defendant's voice as voice of person with whom victim had conversation—could be considered by jury despite inconsistencies as to what witness said she heard; inconsistencies were fully disclosed to jury, as was fact that witness had limited understanding and use of English language.

6. Criminal Law ⇐371(12), 419(2.20)

Where murder victim (defendant's wife) had, on several previous occasions, exhibited physical injuries and notified observers that injuries were inflicted by defendant, testimony concerning such notification was admissible despite hearsay nature to show defendant's state of mind at time of previous attacks and to demonstrate his motive and likelihood that he was perpetrator of fatal attack, notwithstanding defendant's contention that there was no evidence to show that victim died in manner similar to any of prior attacks.

7. Criminal Law ⇐419(4)

Under "*Patterson* exception" to hearsay rule, declarant's prior out-of-court statements may be put in evidence when declarant is in court and testifies.

See publication Words and Phrases for other judicial constructions and definitions.

8. Criminal Law ⇐419(3)

Police officer's testimony concerning telephone conversation he had with witness as to whether murder victim had made trip at time of her disappearance as defendant claimed did not amount to hearsay since it was placed in evidence for proper purpose of showing why officer's investigation took turn it did and not for purpose of establishing whether victim had made trip.

9. Criminal Law ⇐1186.1

Where admission of individual items of evidence does not constitute reversible error, reversal cannot be based upon cumulative effect of that evidence.

10. Criminal Law ⇐683(2)

Scope of rebuttal evidence is within trial court's discretion.

11. Criminal Law ⇐683(1)

Evidence which explains, contradicts, or disproves adversary's evidence may be competent rebuttal evidence.

12. Criminal Law ⇐683(1)

Defendant accused of murdering wife "opened the door" to daughter's rebuttal testimony concerning defendant's threats of violence when she reported that she was raped by presenting evidence attempting to

show that relationship between daughter and victim had been turbulent and that victim had told daughter that it was her own fault that she had been raped.

13. Criminal Law ⇐665(5)

Where there has been violation of witness separation order, trial court, in absence of connivance or collusion by party calling witness, may exercise its discretion to permit witness to testify.

14. Criminal Law ⇐665(5)

Trial court did not abuse its discretion in allowing witnesses to testify despite fact that they had violated witness separation order; there was no indication that prosecution connived to have witnesses violate order, and it was in fact not known after witnesses' initial testimony whether they would have to be recalled.

15. Criminal Law ⇐412(4)

There was no hearsay problem with taped police interviews of murder defendant since defendant testified at trial and was subject to examination concerning interviews.

16. Criminal Law ⇐412(5)

Since murder defendant filed alibi notice, his taped, nonconfessional interviews with police were admissible; interviews concerned defendant's whereabouts on the night of murder.

17. Criminal Law ⇐1169.2(7)

Any error in admitting certified copy of petition for dissolution of marriage, which included restraining order against defendant, was not reversible in defendant's prosecution for murdering wife since such evidence was merely cumulative of other evidence of prior abuse by defendant.

18. Criminal Law ⇐396(1)

Since defendant accused of murdering wife questioned police officer as to how many charges involving abuse of wife had been filed against him and questioned delay in filing, request for initial hearing which stated that defendant had been arrested on bench warrant on battery charge unrelated to murder charge was properly admitted to explain delay.

19. Criminal Law ⇐1169.1(8)

It was not reversible error to permit police officer to testify concerning direction his investigation took after he overheard telephone conversation between murder defendant and his girlfriend, notwithstanding defendant's claim for first time on appeal that eavesdropping violated his Fourth Amendment rights. U.S.C.A. Const. Amend. 4.

Kathleen A. Dayson, Indianapolis and Joseph W. Votaw, III, Lawrenceburg, for appellant.

Linley E. Pearson, Atty. Gen. and Michael Gene Worden, Deputy Atty. Gen., Indianapolis, for appellee.

GIVAN, Justice.

A jury trial resulted in the conviction of appellant of Voluntary Manslaughter, for which he received a sentence of fifteen (15) years.

The facts are: The appellant, Roy Heck, Sr., and the decedent, Rickie Heck, were husband and wife. In August of 1985, Rickie started dissolution proceedings against appellant. Sometime between January 5 and 6, 1986, while the dissolution proceedings were pending, the decedent disappeared.

In late October of 1986, her decomposed remains were found buried on appellant's farm. Dr. Lee Lehman, a pathologist, testified that he performed an autopsy on the remains of the decedent in October of 1986, but because of the advanced decomposition of the remains, he found no demonstrative cause of death. However, after further consideration, the pathologist's report was changed, and because of a broken jaw, which he believed had been inflicted near the time of death, he theorized the probability was that the decedent had died as a result of a severe blow to the head.

Near midnight on January 6, 1986, a number of witnesses in the vicinity of the trailer in which the decedent lived heard an argument between the decedent and another person. Some of these people did not

see the other person, while others stated that they saw the decedent arguing with a tall young man. One of these witnesses, Tessie Standriff, stated that her trailer was near the decedent's trailer and that she heard the argument and could identify appellant as the person arguing with the decedent. She stated that she could not identify him by his face but could identify him by his voice.

At trial, she testified that appellant told the victim she was coming home because she was his wife. However, during a pretrial deposition, she had indicated she had not heard such a statement. The evidence shows that Mrs. Standriff was Philippine and had a limited use and understanding of the English language.

Some of the witnesses testified they heard screaming and gunshots that night. Following the decedent's disappearance, appellant told various relatives that she had told him she was taking a trip to Florida. When Roy Heck, Jr. went with appellant to the decedent's trailer, he noticed food still on the stove. He also noticed the trailer was messed up, which was unusual for his mother. The following day, Junior observed one of his mother's suitcases in appellant's home.

A few weeks before the victim's disappearance, appellant had beaten her and was scheduled to go to trial on charges stemming from that incident the week the victim disappeared. When he failed to appear in court, he was arrested. While in jail, he was visited by his daughter, Roberta, and his girlfriend, Shirley Slaughter. He asked them to sprinkle pepper over the site of a sinkhole on his farm (this is the location where the body eventually was found). He also asked them to remove the victim's possessions from his home, including spare purses and a suitcase, before the police searched the house. The women complied with the request the next day. The suitcase contained items of female apparel. The purse contained the victim's drivers license, social security card, make-up, and other such items.

Appellant also requested that the two women telephone the police pretending to be the victim. Shirley attempted to comply with appellant's request. Appellant later told Roberta to keep quiet about her mother's purse and drivers license.

Robert Cuneo testified that he and his father were in the roof repair business and that in times past appellant had permitted them to dump old shingles on his farm. Shortly after the victim's disappearance, appellant contacted the elder Cuneo and asked him to dump some old shingles in the area where the victim's body later was found. He told Cuneo that he wanted the shingles dumped there to cover up the smell of some soured corn. Robert Cuneo testified that the area appeared to have been recently dug out and smoothed over.

In March of 1986, Roberta was in Florida with Eleanor Slaughter, Shirley's mother-in-law, and Shirley's daughter, Shawn Theis. She observed that Eleanor had the victim's ring in her possession with other jewelry to be sold. Eleanor told her that appellant had given her the ring to sell. Appellant later claimed that he had obtained the ring when the victim threw it at him during an argument.

In October of 1986, appellant was served with a warrant to search his farm and in particular the sinkhole site where the victim's remains later were found. Shortly after the warrant was served, appellant left and went to Tennessee. However, he returned shortly and turned himself in to the police.

[1, 2] Appellant claims the evidence is insufficient to support his conviction and couples this with his claim that much of the evidence submitted was inadmissible. Appellant contends the State's evidence fails to disclose the cause, means, manner, place, or time of the victim's death. It is true that none of these facts was established by direct evidence. However, a jury's verdict may be based solely upon circumstantial evidence. *Rowan v. State* (1982), Ind., 431 N.E.2d 805.

In the case at bar, there is ample evidence to support a finding that appellant had a history of battering his wife, including a criminal charge for which he was to

go on trial near the time of her disappearance. There also was evidence that at the time of the victim's disappearance, appellant had stated falsely to others that his wife had gone on a trip. He also removed luggage and personal items from her trailer to his home, then instructed his girlfriend and his daughter to remove those items before police came to the house.

Further, appellant's conviction is supported by the fact that the victim's remains were found buried on appellant's farm, that he caused others to dump old shingles on the site of her burial, and that when police obtained a search warrant to search his farm he left the state. His flight was relevant although appellant did return to Indiana of his own volition and turn himself in to the police. The jury also was entitled to believe that a man fitting appellant's general description was heard engaged in a heated argument with the decedent at her trailer on the evening she disappeared.

Appellant claims the State failed to prove by any credible evidence the cause of the decedent's death. It is true that when the remains were first examined by the pathologist, he stated that due to the state of decomposition he could not state a cause of death. However, upon further consideration, he observed that the presence of a broken jaw, which had occurred at approximately the time of death, could indicate a blow to the head which might have been severe enough to have caused death.

[3] This Court has held that the cause of death may be established by circumstantial evidence. *Patterson v. State* (1988), Ind., 532 N.E.2d 604. There is ample circumstantial evidence in this case to support the jury's determination that the victim had met a violent death at the hands of appellant.

Appellant attacks the testimony of State's witness Tessie Standriff, whose trailer was situated near the trailer of the victim. She testified that on the night of the victim's disappearance, she heard the victim having a heated argument with a tall man. She was unable to identify his face, but she said she recognized his voice as appellant's.

[4] Appellant points out that during the investigation Standriff came to the police department and asked to hear the voice of appellant on a tape recorder. The police complied with her wish. She verified that the voice was the same voice she had heard on the night of the victim's disappearance. Appellant contends that this constituted an impermissibly suggestive identification of appellant's voice in that Standriff knew she was listening to the voice of appellant at the time she made the identification.

It is true that this Court has held that it is improperly suggestive for police to inform a lineup observer that the suspect is in the lineup. *Chambers v. State* (1981), Ind., 422 N.E.2d 1198; *Young v. State* (1979), 272 Ind. 1, 395 N.E.2d 772. However, this was not a lineup or voice identification instituted by the police officers.

Standriff suspected that the person she had seen and heard was the husband of the victim, and she came to police headquarters knowing that they had tape recordings of appellant's voice and she wanted to assure herself that she was correct in believing the person she had heard was in fact appellant. This certainly does not fall within the framework of a police-engineered lineup or voice identification.

Rather than a thing to be condemned, Standriff's action was a proper and conscientious thing to be condoned. She merely was striving to make sure she had not made an error in the voice identification. We see nothing in this episode to taint her in-court identification of appellant's voice and her statement that the voice was the same voice she had heard on the night of the victim's disappearance.

[5] Appellant also contends that Mrs. Standriff's testimony should not be believed because during the early stages of the investigation she had stated that she had not heard the man state that the victim should come home with him because she was his wife. However, at trial she testified that such was the conversation she heard. This inconsistency was fully disclosed to the jury. It also was disclosed that Mrs. Standriff was from the Philippines and that she had a very limited understanding and use of the English language. The jury was entitled to determine whether this fact contributed to the apparent inconsistencies in Standriff's statements. *Bane v. State* (1981), Ind., 424 N.E.2d 1000.

[6] Appellant claims the judgment is contrary to law due to the highly prejudicial and irrelevant hearsay testimony of certain of the State's witnesses. Twelve different witnesses testified concerning various incidents in which the decedent had displayed bruises and informed other persons that she had been beaten by appellant. In situations such as the case at bar, where the victim on several previous occasions has exhibited physical injuries and has notified observers that the injuries were inflicted by the defendant, such testimony, although hearsay, is admissible to show the defendant's state of mind at the time of those attacks and to demonstrate his motive and the likelihood that he was the perpetrator of the fatal attack upon the decedent. *Drummond v. State* (1984), Ind., 467 N.E.2d 742, citing *Romine v. State* (1983), Ind., 455 N.E.2d 911 and *Moore v. State* (1981), 275 Ind. 39, 414 N.E.2d 558.

Appellant attempts to distinguish this line of cases, stating that although he and the decedent had an on-going relationship, there was no evidence that the deceased died in a manner similar to any of the prior assaults. Thus, he argues, the testimony in addition to being hearsay was irrelevant. We cannot agree with appellant in his evaluation of this evidence. The prior injuries to the victim were claimed by her to be the result of physical beatings from appellant. The evidence in this case, although wholly circumstantial, was that there was a high probability the victim died from a beating of such severe intensity that a broken jaw resulted. Rather than distinguishing the line of cases above cited, such evidence brings the case squarely within the rationale of those cases.

We see no error in the admission of the evidence of prior beatings suffered by the victim at the hands of the appellant.

[7] Appellant claims the trial court erred when it allowed Robert Cuneo to testify what his father, Harry Cuneo, had told him regarding appellant's request that they dump shingles at a designated place on his farm. However, this comes under the *Patterson* exception to the hearsay rule that when the declarant is in court and testifies, his prior out-of-court statements may be put in evidence. *Patterson v. State* (1975), 263 Ind. 55, 324 N.E.2d 482. Appellant makes the same complaint against the testimony of Mary Cuneo. Her testimony was admissible for the same reason. *Id.*

[8] Appellant also contends it was error to admit the testimony of Detective Michael Kreinhop concerning a telephone conversation he had with Donna Brady as to whether the victim had made a trip to Florida at the time of her disappearance. This testimony, however, was not placed in evidence for the purpose of the truth of whether the victim had gone to Florida but for the purpose of showing why the officer's investigation took the turn it did. The evidence was admissible to show the reason for the officer's subsequent action. *Altmeyer v. State* (1988), Ind., 519 N.E.2d 138; *Boyd v. State* (1986), Ind., 494 N.E.2d 284, *cert. denied.* 479 U.S. 1046, 107 S.Ct. 910, 93 L.Ed.2d 860; *Stout v. State* (1985), Ind., 479 N.E.2d 563.

[9] Appellant claims even if this Court would hold that the testimony of the various individuals was admissible, the sheer number of witnesses who testified to extrajudicial statements rendered them so prejudicial as to require reversal. However, this Court has held that where individual items of evidence do not constitute reversible error, we will not reverse based upon the cumulative effect of that evidence. *See Stonebraker v. State* (1987), Ind., 505 N.E.2d 55; *Hudson v. State* (1986), Ind., 496 N.E.2d 1286. We see no reversible error in the admission of the above evidence.

[10–12] Appellant contends the trial court erred in allowing the rebuttal testimony of Roberta Heck. On rebuttal, she testified that she had reported to appellant that she had been raped but that he told her not to report it—that he would "get him (rapist) in his own time." He further stated to her that he was "going to break his (rapist) legs or something." Appellant claims this irrelevant testimony was highly prejudicial to his case. The scope of rebuttal evidence is within the trial court's discretion. *Stewart v. State* (1988), Ind., 531 N.E.2d 1146. Evidence which explains, contradicts, or disproves the adversary's evidence may be competent rebuttal evidence. *Buchanan v. State* (1975), 263 Ind. 360, 332 N.E.2d 213.

In the case at bar, appellant attempted to intimate that someone else, such as his daughter Roberta, had been responsible for the death of the decedent. In pursuing this claim, he presented evidence attempting to show that the relationship between the decedent and Roberta had been turbulent. In his direct testimony, he claimed that Roberta had been involved in an argument and a fight with a man named Luther Thompson, who, he claimed Roberta said, had raped her. He further stated that he had told Roberta to go to the police but that his wife had told her it was her own fault.

In raising such an issue, appellant opened the door for Roberta's rebuttal testimony to state her version of what had happened when she reported the rape to her parents. We see no error in the admission of Roberta's rebuttal testimony.

[13, 14] Appellant claims the court abused its discretion when, upon learning that the order for separation of witnesses had been violated, it allowed testimony from witnesses who had violated the separation order. Where there has been a violation of a separation order, the trial court, in the absence of connivance or collusion by the party calling the witness, may permit the witness to testify. *Cox v. State* (1981), 275 Ind. 636, 419 N.E.2d 737; *O'Conner v. State* (1980), 272 Ind. 460, 399 N.E.2d 364. The trial court's decision on such a matter will not be reversed absent an abuse of discretion. *Buchanan, supra.*

In the case at bar, appellant makes no claim that the prosecutor in any way connived to have the witnesses violate the separation order. In fact, the prosecutor observed that it was not known that these witnesses, after their initial testimony, would be recalled to the stand and that he only learned of such a necessity after appellant had presented unanticipated evidence which required the rebuttal testimony of the witnesses who had violated the order following their initial testimony. Under the circumstances, we see no reversible error in permitting these witnesses to testify.

[15, 16] Appellant contends the trial court erred in admitting State's Exhibits Nos. 2, 3, 101, and 105. Appellant acknowledges that the trial court has broad discretion in ruling on the admissibility of evidence and will be reversed only for a clear abuse of discretion. *Jackson v. State* (1986), Ind., 490 N.E.2d 1115. However, he claims that in the case at bar the questioned evidence was inadmissible because its prejudicial impact outweighed its probative value, citing *Rust v. Guinn* (1981), Ind.App., 429 N.E.2d 299. Exhibits 2 and 3 were taped interviews of appellant by the police. Neither tape included a confession. Appellant claims they thus were inadmissible because they were simply hearsay statements made by appellant and neither tape had any logical tendency to prove a material fact.

First, the State correctly observes that there is no hearsay problem in this issue because appellant testified at trial and was subject to examination on the evidence. *See Washburn v. State* (1986), Ind., 499 N.E.2d 264. As to the relevancy of his statements, appellant had filed an alibi notice in which he claimed to have been at the home of his son at the time the murder was believed to have taken place. The statements appellant made in these interviews concerned his whereabouts on the night of the homicide. Evidence is relevant if it tends to prove or disprove any material fact. *See Mengon v. State* (1987), Ind., 505

N.E.2d 788. Under the circumstances, we see no error in admitting State's Exhibits Nos. 2 and 3 into evidence.

[17] State's Exhibit No. 101 is a certified copy of a petition for dissolution of the marriage between appellant and the victim. Appellant claims the State introduced the petition for the sole purpose of having the jury see that a restraining order against him was issued from the divorce court. He claims that such evidence is clearly inadmissible because its prejudicial impact outweighs its probative value, citing *Rust, supra.* Appellant claims, without citing authority, that to place before the jury the fact that a restraining order had been issued is improper. However, in the case at bar, there was an abundance of other evidence of prior abuse by appellant against the victim.

Even if we would assume *arguendo* that appellant's contention is correct and that a restraining order should not be placed before the jury, in the case at bar such evidence was merely cumulative and to only a minuscule degree. The evidence of the victim's prior abuse was overwhelming and the addition of the fact that a divorce court had issued a restraining order hardly could be expected to have any significant impact upon the decision of the jury. We see no reversible error in the admission of State's Exhibit No. 101.

[18] State's Exhibit No. 105 is a request for an initial hearing stating that appellant was arrested on a bench warrant on a battery charge which was not the subject matter of the case at bar. Again, there was admissible independent evidence that appellant was to come to trial on a charge of assaulting the victim and that he was to appear in court shortly after the time the victim disappeared. The fact that State's Exhibit 105 concerned that charge was merely repetitious of what the jury already had before it.

During cross-examination of Detective Kreinhop, appellant questioned him as to how many charges had been filed and questioned the delay in filing the charges. The State's presentation of its Exhibit 105 was a response by the prosecutor to explain the delay in filing the instant charge. It was entirely proper for the State to present evidence to explain the questions raised by the cross-examination of Detective Kreinhop. *Starks v. State* (1987), Ind., 517 N.E.2d 46; *Kalady v. State* (1984), Ind., 462 N.E.2d 1299. We see no reversible error in the admission of State's Exhibit No. 105.

[19] Appellant contends the trial court erred when it allowed the testimony of Officer Kreinhop regarding a telephone conversation and his actions after he heard the conversation. The officer testified to overhearing a conversation between appellant and his girlfriend, Shirley Slaughter. Appellant is apparently arguing that eavesdropping upon his conversation violated his Fourth Amendment rights and that any evidence and investigation resulting from the overhearing of the conversation should be suppressed.

At trial, however, appellant's objection was not based upon this Fourth Amendment claim. His objection at trial was that there was a discovery violation, both because he had not been apprised of any statement of his own made in the telephone conversation and because any statement by Shirley Slaughter was hearsay. We further would observe that the trial court sustained appellant's objection to the content of the conversation overheard by Detective Kreinhop. Testimony as to what the officer did after he heard the telephone conversation has been held to be proper evidence. *See Hester v. State* (1987), Ind., 512 N.E.2d 1110; *Boyd, supra.* We see no reversible error in permitting the officer to testify as to what avenue of investigation he pursued after hearing the telephone conversation.

The trial court is affirmed.

SHEPARD, C.J. and PIVARNIK, J., concur.

DeBRULER, J., dissents with separate opinion.

DICKSON, J., concurs in result without separate opinion.

DeBRULER, Justice, dissenting.

The same safeguards should be employed by the police forces in voice identification procedures as are employed in seeking visual or photographic identifications. *Matthews v. State* (1988), Ind., 518 N.E.2d 807. The admissibility of the products of such procedures is to be determined upon application of a two-pronged test, the first prong of which is the determination from a totality of the circumstances of whether the procedures are unduly and unnecessarily suggestive, and the second prong of which is whether, if so unduly and unnecessarily suggestive, there was created a substantial likelihood of irreparable misidentification. *Norris v. State* (1976), 265 Ind. 508, 356 N.E.2d 204. If a process fails the test and produces a tainted out-of-court identification by a witness, such witness may nevertheless make an in-court identification if that in-court identification does not depend upon the pre-trial one, but has an independent origin. *Id.*

Here, there is no evidence that the witness Standriff was previously acquainted with appellant's voice or that of the unidentified assailant before the night of the victim's disappearance. Her identification was very uncertain up to the point in time, one week before the trial, when she visited the police station. The voice which she did hear uttered only a few words. American English was not the mother tongue of the witness. She was from the Phillipines. She was not a victim, with attention fixed upon one who was attacking her, but simply a neighbor overhearing a neighborhood brouhaha. When, therefore, she came to the police station and asked to hear the suspect's recorded voice, and the police had such a recording, they were under a duty, the same as if the idea had been theirs, to present her with a fair voice identification array or lineup. *Matthews*, 518 N.E.2d 807. Under the totality of these circumstances, their failure to employ such a fair procedure created a very substantial likelihood of irreparable misidentification. The same set of circumstances indicate that there was no independant origin for her in-trial identification from a similar tape of appellant's voice. It was therefore constitutionally inadmissible. I would reverse and remand for a new trial at which such identification testimony would be excluded.

KEY NUMBER SYSTEM

Donald N. SCHWEITZER, Appellant,

v.

STATE of Indiana, Appellee.

No. 26S00-8811-CR-910.

Supreme Court of Indiana.

April 6, 1990.

Defendant was convicted in the Circuit Court, Gibson County, Walter H. Palmer, J., of attempted murder and criminal recklessness, and he appealed. The Supreme Court, Givan, J., held that: (1) trial court's instructions were proper; (2) evidence sustained rejection of plea of not guilty by reason of insanity; and (3) sentence was not excessive.

Affirmed.

Dickson, J., dissented.

1. Criminal Law ⇐829(3)

Court did not err in refusing defendant's tendered instruction as to the elements required to be proven to establish attempted murder where the court did give a correct statement of law in that regard.

2. Criminal Law ⇐829(9)

Trial court did not err in refusing defendant's instruction that jurors must accept inferences consistent with innocence if they found the facts of guilt or innocence equally probable, where the court's instructions, taken together, fully covered the contents of the tendered instruction.

DC 12 (Rev 8/82) **APPLICATION TO PROCEED IN FORMA PAUPERIS, SUPPORTING DOCUMENTATION & ORDER**

United States District Court	DISTRICT SOUTHERN OF INDIANA(NEW ALBANY DIVISI
CASE TITLE ROY HECK v. JAMES HUMPHREY,et al	DOCKET NO. NA 88-209-C MAGISTRATE CASE NO.

FILED
DEC 27 1988
JOHN A. [illegible]
CLERK

I, ROY HECK, declare that I am the (check appropriate box)

☒ petitioner/plaintiff ☐ movant (filing 28 U.S.C. 2255 motion)

☐ respondent/defendant ☐ other _____

in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceeding or the issues I intend to present on appeal are briefly stated as follows: 42 U.S.C.1983,1985(2)1986,1988, ACTION FOR DEPRIVATION OF MY FOURTH AND FOURTEENTH AMENDMENT RIGHTS TO BE FREE FROM AN ILLEGAL INVESTIGATION AND DUE PROCESS.

In further support of this application, I answer the following questions.

1. Are you presently employed? Yes ☐ No ☒
   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. (list both gross and net salary)

   INCARCERATED INMATE/$13.00/MONTH

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

   AUGUST 12,1986
   $800.00/MONTH

2. Have you received within the past twelve months any money from any of the following sources?
   a. Business, profession or other form of self-employment Yes ☐ No ☒
   b. Rent payments, interest or dividends? Yes ☐ No ☒
   c. Pensions, annuities or life insurance payments? Yes ☐ No ☒
   d. Gifts or inheritances? Yes ☐ No ☒
   e. Any other sources? Yes ☐ No ☒

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in checking or savings account?
   Yes ☐ No ☒ (Include any funds in prison accounts.)
   If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?
   Yes ☐ No ☒
   If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

NONE

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 12/16/88 (Date) Gary Heck #874376 Signature of Applicant

CERTIFICATE
(Prisoner Accounts Only)

I certify that the applicant herein has the sum of $ $29.16 on account to his credit at the _____ institution where he is confined. I further certify that the applicant likewise has the following securities to his credit according to the records of said institution: _____

_____

_____

_____
Authorized Officer of Institution

ORDER OF COURT

The application is hereby denied

_____ _____
United States Judge *Date*

The application is hereby granted. Let the applicant proceed without prepayment of cost or fees or the necessity of giving security therefor.

_____ _____
United States Judge or Magistrate *Date*

FORM TO BE USED BY PERSONS IN FILING A COMPLAINT PRO SE UNDER THE CIVIL RIGHTS ACT, 42 USC 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

NEW ALBANY DIVISION

ROY HECK

_____

_____

_____
(Enter here the full name of the plaintiff or plaintiffs in this action.)

COMPLAINT

v. **Civil No.** _____

JAMES HUMPHREY, DEARBORN COUNTY PROSECUTOR;
ROBERT EWBANK, ATTRONEY; AND MICHAEL KRINOPH,
INDIANA STATE POLICE INVESTIGATOR; ALL IN THIER OFFICIAL AND INDIVIDUAL CAPACITIES AS SUCH

_____
(Enter here the full name of the defendant or defendants in this action.)

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your claim?

YES ( ) NO (X)

B. If your answer to A is yes, describe the action in the space below. (If there is more than one action, describe the additional actions on the reverse side of this page).

1. Parties to the Action: _____
2. Court (if federal court, name the district; if state court name the county):

   _____
3. Docket number: _____
4. Name of judge who heard case: _____
5. Disposition (For example, was the case dismissed? Was it appealed? Is it still pending?)

   _____

If you are imprisoned in a state penal institution, then answer C: 1,2 and 3:

C. 1. Did you present this complaint to the state prison grievance procedure?

YES ( ) NO (X)

2. If your answer is yes, what was the result?

3. If your answer is no, please explain.

THIS IS NOT A PRISON MATTER

PARTIES

(Place your full name in the first blank in paragraph 1. In the second blank, place your present address. Do the same for additional plaintiffs, if any).

1. The plaintiff is ROY HECK #874376

WESTVILLE CORRECTIONAL CENTER,WESTVILLE,INDIANA 46391

2. Plaintiff's address (and prison number) is:

SEE ABOVE

CAUSE OF ACTION

D. I allege that the following of my constitutional rights, privileges or immunities have been violated:

Allegation 1: DEFENDANTS JAMES HUMPHREY,ROBERT EWBANK,AND MICHAEL KRINOPH,ACTING UNDER COLOR OF STATE LAW,CONSPIRED AND/OR ACTED IN CONCERT WITH A MEETING OF THE MIND TO SUBJECT PLAINTIFF HECK TO AN ILLEGAL INVESTIGATION IN VIOLATION OF THE FOURTH,AND FOURTEENTH AMENDMENTS TO THE U.S.CONSTITUTION,AND 42 U.S.C.1983,1985(2),1986, [redacted] 2: AND 1988.

[redacted] 3:

E. The following facts form the basis for allegations listed above in D. (Include all of the facts you consider important, and state them clearly and in your own words - but do NOT make legal arguments or citations).

Allegation 1:

"SEE ATTACHED SHEET FOR FACTS IN SUPPORT"

Allegation 2:

Allegation 3:

(If you need more space to explain any allegation or to list additional facts, use the other side of this sheet, or attach an additional sheet.)

REQUEST FOR RELIEF

1. I DO (do, do not) request that I be allowed to commence this action without prepayment of fees and costs, or security therefore, pursuant to 28 U.S.C. 1915. The affidavit of indigency below has been completed and is submitted in support of this request for leave to proceed in forma pauperis.

SUPPORTING FACTS TO MY ALLEGATION AGAINST DEFENDANTS JAMES HUMPHREY,ROBERT EWBANK, AND MICHAEL KRINOPH.

BETWEEN MAY AND JULY,1987:

1. DEFENDANTS HUMPHREY,EWBANK,AND KRINOPH,AFTER CONDUCTING A SEARCH IN 1986 OF MY DESEASED WIFE'S TRAILOR HOME,TOOK ITEMS FROM HER RELATIVES AND USED THEM IN THEIR UNLAWFUL,UNREASONABLE,AND ARBITRARY INVESTIGATION OF ME BECAUSE THEY,TOGETHER THROUGH AGREEMENT, UNDERSTANDING,AND CONTROL BELIEVED ME TO BE RESPONSIBLE FOR HER DEATH.

2. THEY ALSO ARBITRARILY,UNLAWFULLY,UNREASONABLY AND KNOWINGLY DESTROYED CLOTHING FROM MY DESEASED WIFE'S BODY WHICH WAS EXCULPATORY IN NATURE AND COULD HAVE PROVED MY INNOCCENCE OF THIS CRIME.

3. THESE NAMED DEFENDANTS DIRECTED IN CONCERT WITH A MUTUAL UNDERSTANDING AND AGREEMENT AN ILLEGAL AND UNLAWFUL VIOCE IDENTIFICATION PROCEDURE (3)TIMES WITH A POTENTIAL STATE WITNESS,WITHOUT MY OR MY ATTORNEY'S PRESENCE TO FURTHER THE OBJECTIVES OF SAID CONSPIRACY AGAINST ME.

4. ALL OF THE DEFENDANTS ACTIONS WERE PRELIMINARY POLICE INVESTIGATIVE ACTIVITY TO GATHER EVIDENCE ILLEGALLY AND BY ANY MEANS NECESSARY TO CHARGE ME WITH THE CRIME OF KILLING MY WIFE.

5. AT ALL TIMES DURING THIS UNLAWFUL,UNREASONABLE, AND ARBITRARY INVESTIGATION THE DEFENDANTS KNEW PLAINTIFF HAD CLEARLY ESTABLISHED U.S.CONSTITUTIONAL AND STATUTORY RIGHTS TO BE FREE FROM THIS TYPE OF ILLEGAL CONDUCT BY PUBLIC OFFICIALS YET THEY OVERRIDED THEM IN CONCERT.

6. BOTH THE DEFENDANTS HUMPHREY AND EWBANK,EVEN THOUGH COUNTY PROSECUTORS AT SAID TIME,WERE ACTING AS "POLICE INVESTIGATORS",AND NOT FUNCTIONING IN THEIR QUASI-JUDICIAL CAPACITIES AGAINST THE PLAINTIFF.

7. ALL OF THE NAMED DEFENDANTS HAD PRIOR KNOWLEDGE OF THE WRONGS CONSPIRED TO BE DONE AGAINST THE PLAINTIFF,AND HAVING POWER TO PREVENT OR AID IN THE PREVENTING THE COMMISSION OF SAME,NEGLECTED OR REFUSED TO DO ANYTHING TO PREVENT THE PLAINTIFF'S CIVIL RIGHTS FROM BEING VIOLATED.

2. I believe that I am entitled to the following relief:

SEE ATTACHED COPY

Roy Heck #874376
(Signature)

P.O. BOX 473

Westville Ind. 46391
(Address)

AFFIDAVIT

STATE OF INDIANA)
) SS:
COUNTY OF LAPORTE)

Before me the undersigned in and for the said county and state presently appeared ROY HECK, plaintiff in the within action who, being first duly sworn according to law, deposes and says that the facts set forth in the foregoing complaint are true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes them to be true.

Roy Heck #874376
(Signature of affiant-plaintiff)

SUBSCRIBED AND SWORN TO BEFORE ME THIS 21 DAY OF December, 1988.

Robert J. Bulak
Notary Public or other person authorized by law to administer oaths.

ROBERT J BULAK
NOTARY PUBLIC STATE OF INDIANA
LA PORTE COUNTY
MY COMMISSION EXP. MAR 9 1992

PLAINTIFF BELIEVES HE IS ENTITLED TO THE FOLLOWING RELIEF:

A) A DECLARATORY JUDGEMENT PURUANT TO 28 U.S.C.A.2201-2202, DECLARING WHETHER OR NOT DEFENDANTS VIOLATED PLAINTIFF'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS NOT TO BE SUBJECT TO AN ILLEGAL CRIMINAL INVESTIGATION.

B) COMPENSATION IN THE AMOUNT OF $300,000.00, FROM EACH NAMED DEFENDANT FOR VIOLATING PLAINTIFF'S CIVIL RIGHTS AND HIS LOSSES INCURED FROM HIS EMPLYMENT AND FARM OPERATIONS.

C) PUNITIVE DAMAGES IN THE AMOUNT OF #300,000.00, FROM EACH NAMED DEFENDANT FOR VIOLATING PLAINTIFF'S CIVIL RIGHTS.

D) INTEREST AND COSTS INCURRED IN LITIGATING THIS ACTION IF PLAINTIFF SHOULD PREVAIL ON ANY OF HIS CLAIMS.

E) ATTORNEY FEES AWARD IF PLAINTIFF PREVAILS ON ANY OF HIS CLAIMS.

STATUTORY APPENDIX

42 U.S.C. § 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1997e provides, in relevant part:

Applicability of administrative remedies

(a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under this paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum standards promulgated under subsection (b) of this section.

28 U.S.C. § 2254(b) provides:

An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

ORIGINAL

(3)

No. 93-6188

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAMELA CARTER
Attorney General of Indiana

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*Counsel of Record

BEST AVAILABLE COPY

No. 93-6188

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

ROY HECK,

Petitioner,

v.

JAMES HUMPHREY, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a prisoner may attack the legality of his state court conviction in a federal action through 42 U.S.C. § 1983, seeking declaratory and monetary relief, without first exhausting state remedies.

2. Whether a prisoner's federal action under 42 U.S.C. § 1983 attacking the legality of his state court conviction should be dismissed, rather than stayed, pending exhaustion of state remedies.

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IN THE
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---

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

Petitioner, a state prisoner, has attacked the legality of his conviction in a federal action under 42 U.S.C. § 1983, seeking monetary and declaratory relief. The district court dismissed the action without prejudice, finding that petitioner must exhaust state remedies. The court of appeals affirmed.

1. Petitioner is presently confined at the Westville Correctional Center in Westville, Indiana, where he is serving a fifteen-year sentence for killing his wife. The evidence against petitioner at his criminal trial was overwhelming.

On or about January 6, 1986, while marriage dissolution proceedings were pending, petitioner's wife, Rickie Heck, disappeared. Several months later, in October of 1986, her decomposed body was found buried on petitioner's farm. The pathologist opined that she had died as a result of a severe blow to the head. Pet. App. 11a.

The week of Mrs. Heck's disappearance, petitioner was scheduled to stand trial for beating her. When he failed to appear in court, petitioner was arrested. While in jail, petitioner asked his daughter and his girlfriend to sprinkle pepper over a sinkhole on his farm (where the body of his wife was later discovered) and to remove his wife's possessions, including her purse and suitcase, from petitioner's residence on the farm before it was searched by police. The suitcase contained items of female apparel and the purse contained his wife's make-up, social security card and drivers license. Petitioner told his daughter to remain quiet about the removal of his wife's possessions from his home. Petitioner also requested that they telephone the police pretending to be his wife. Id. at 12a.

Following Mrs. Heck's disappearance, petitioner also told various relatives that his wife was taking a trip to Florida. When the Hecks' son went to her trailer, however, he noticed food still on the stove and her belongings in an unusual state of disarray. Ibid.

Shortly after his wife's disappearance, petitioner asked two men in the roofing business to dump old shingles over the area

where his wife's body was buried. Petitioner told the men he wanted the shingles dumped there to cover up the smell of soured corn. One of the men testified that the area appeared to have been recently dug out and smoothed over. Ibid.

In October of 1986, petitioner, upon being served with a warrant to search his farm, fled to Tennessee. He returned shortly and turned himself in to the police. Ibid.

At trial, a number of Mrs. Heck's neighbors testified that they heard an argument between Mrs. Heck and another person near midnight on the day of her disappearance. One witness identified petitioner, by voice, as the person arguing with Mrs. Heck. Id. at 11a-12a.

On July 30, 1987, a jury convicted petitioner of killing his wife. The Indiana Supreme Court upheld petitioner's conviction on direct appeal. Heck v. State, 552 N.E.2d 446 (Ind. 1990). Pet. App. 9a-17a

2. On December 27, 1988, petitioner filed this lawsuit in federal court under 42 U.S.C. §§ 1983, 1985(2), 1986 and 1988.[1] Petitioner alleged that James Humphrey and Robert Ewbank, both Dearborn County prosecutors, and Michael Krinoph, an investigator with the Indiana State Prison, conspired to conduct an illegal search, destroy exculpatory evidence and direct an illegal voice identification procedure with a state witness. Petitioner alleged that this conspiracy prevented him from proving his

[1] Petitioner was denied in forma pauperis status. As a result, respondents were never served with a summons or complaint and thus are not formally parties to this action.

innocence. See Pet. App. 23a. Petitioner sought declaratory relief, compensatory and punitive damages, interest, costs and attorneys' fees. Petitioner based his claim for damages on the lost income caused by his improper confinement. Pet. App. 25a.

The district court dismissed petitioner's section 1983 action, finding that his claim "directly implicate[s] the legality of his confinement." Pet. App. 7a. The district court reasoned that the "exclusive means by which [petitioner may challenge the legality of his confinement] in federal court is through an action for habeas corpus relief, which in turn may be brought only after available state remedies have been exhausted." Pet. App. 7a-8a.

3. The Seventh Circuit unanimously affirmed. Pet. App. 1a-5a. The court of appeals held that petitioner must exhaust his state remedies because, regardless of the relief sought, petitioner challenged the legality of his conviction. Pet. App. 3a. The court of appeals explained that petitioner, "while not explicitly requesting that his conviction be vacated, claims that he would not have been convicted had the defendants not violated his constitutional rights." Id.

The court of appeals next held that petitioner's claim should be dismissed, rather than stayed. The court of appeals acknowledged that it disagreed with the decisions of other circuits holding that the district court should stay rather than dismiss the suit. The court of appeals explained that an automatic stay "gives inadequate weight to the policy of the

statute of limitations, which is to bar stale suits." Ibid. The court of appeals went on to decide that if a prisoner were met with a statute of limitations defense following exhaustion, he could invoke the doctrine of equitable tolling. Ibid. The court of appeals expressed no view on whether the doctrine of equitable tolling would apply in this case because to do so would have been premature. Pet. App. 5a. A majority of the judges on the entire court voted not to rehear the case en banc. Ibid.

4. On June 19, 1990, after the district court dismissed his action under section 1983, petitioner filed a petition for habeas corpus relief under 42 U.S.C. § 2254, in which he again challenged the legality of his conviction. The district court dismissed the action without prejudice because petitioner had failed to exhaust state remedies on his claim of ineffective assistance of counsel. Heck v. Richards, No. S90-205 (N.D. Ind.). On January 22, 1991, petitioner refiled his petition for habeas corpus relief, this time without the ineffective assistance claim. The district court denied his petition. Heck v. Richards, No. S91-40 (N.D. Ind. July 30, 1991). The Seventh Circuit affirmed. Heck v. Richards, No. 91-3034 (7th Cir. Sept. 28, 1992).

5. On November 8, 1993, petitioner filed a second action against respondents under section 1983, raising the identical claims and seeking the identical relief as this action. Heck v. Humphrey, No. NA 93-108-C (N.D. Ind.). The district court granted petitioner in forma pauperis status, finding that

petitioner had exhausted state remedies, as required by the Seventh Circuit's decision here. Respondents have not yet answered or otherwise responded to petitioner's second section 1983 complaint.

REASONS FOR DENYING THE WRIT

This case does not warrant further review. At the threshold, this Court's review would be of no value to petitioner in obtaining the relief he seeks. In the direct appeal of his criminal conviction and in his second petition for habeas corpus relief, petitioner has already had the opportunity to litigate the issues raised in this section 1983 action. The prior judgments would therefore be accorded preclusive effect in his section 1983 action.

In any event, the Seventh Circuit's conclusion that petitioner must exhaust state remedies before he may attack the legality of his conviction in federal court under 42 U.S.C. § 1983 -- the principal issue on which petitioner seeks review -- is consistent with this Court's decisions and with every court of appeals' decision that has addressed the question. The complete uniformity among the dozens of court of appeals' decisions reflects the clarity with which this Court addressed the issue in Preiser v. Rodriguez, 411 U.S. 475 (1973).

Petitioner's assertion that the type of relief sought by a prisoner in a federal lawsuit is the sole determinant of whether he must exhaust state remedies is unsupported by the language of

and policies underlying this Court's decisions. Not surprisingly, petitioner's view, without exception, has been roundly rejected by the lower courts. Petitioner's view was accepted only in a few early dissenting opinions and in dicta -- but never in a holding.

The case with which the Seventh Circuit's decision purportedly conflicts, Mack v. Varelas, 835 F.2d 995 (2d Cir. 1987), did not involve the question presented here. The prisoner in Mack did not attack the legality of his conviction. Nor did Mack hold that the relief sought is the lone factor in determining whether exhaustion is required.

The other court of appeals' decisions cited by petitioner to demonstrate the supposed disarray among the lower courts in applying Preiser also did not involve attacks on the validity of a conviction. While lower courts may have expressed some difficulty in applying Preiser to prisoner claims that are different than those here, such as challenges to conditions of confinement, that confusion would not be resolved by this Court's review of the Seventh Circuit's decision. Thus, this case would be a particularly poor vehicle for revisiting this Court's jurisprudence under Preiser.

This Court's review of the second question raised by petitioner -- whether a prisoner's action should be stayed, rather than dismissed, pending exhaustion of state remedies -- is also not warranted. The conflict among the circuits is a fresh one, which may be resolved by Congress. Moreover, because the

Seventh Circuit provided for equitable tolling of prisoners' claims under section 1983, there is essentially no practical difference between its approach and that of the other circuits. Finally, the Seventh Circuit's decision was proper, so there is no need for this Court to correct that ruling.

1. Because Petitioner's Section 1983 Claims Are Barred by Collateral Estoppel, Review by This Court Would Be of No Value to Petitioner in Obtaining Relief.

Review by this Court is not warranted because it would be of no value to petitioner in obtaining the relief he seeks in his action under 42 U.S.C. § 1983. Petitioner has twice litigated the allegations contained in his section 1983 action and on both occasions has lost. In the direct appeal of his criminal conviction, petitioner attacked the legality of his conviction, claiming that he had been subjected to an illegal investigation. See Pet. App. 13a-16a. And in his habeas corpus action, petitioner reiterated these same allegations, with an equal degree of success.

Accordingly, petitioner would be barred from relitigating these claims in his section 1983 action. A federal court entertaining petitioner's section 1983 action would accord preclusive effect to the issues decided by the state and federal courts. Allen v. McCurry, 449 U.S. 90, 103-04 (1980). A federal court also would accord preclusive effect to those issues that petitioner had the opportunity to litigate -- which plainly includes all claims raised here. Sullivan v. American Casualty Co., 605 N.E.2d 134, 138-39 (Ind. 1992). Indiana, moreover, does

not require mutuality of parties for defensive use of collateral estoppel. Ibid. As the Seventh Circuit recognized, "if his conviction were proper, this suit would in all likelihood be barred by res judicata." Pet. App. 3a. Thus, this Court's review of the Seventh Circuit's decision here would result in little more than an advisory opinion. There is no reason to give petitioner a third bite at the apple.

2. The Decision Below Is Not in Conflict With This Court's Cases or Those of the Federal Courts of Appeals.

A. At the outset, given petitioner's efforts to manufacture confusion where none exists, it is important to clarify what petitioner claimed in his section 1983 action and what the Seventh Circuit decided. Petitioner's claim was narrow: he attacked the legality of his conviction, alleging that respondents conspired to subject him to an illegal investigation and prevent him from proving his innocence. Pet. App. 21a, 23a. Petitioner sought a declaration that he was the victim of an unconstitutional investigation and damages to compensate him for lost income caused by his incarceration. Id. at 25a. Petitioner did not explicitly seek release from confinement.

Following its own long-standing precedent, the Seventh Circuit held that, because petitioner's claim consisted solely of an attack on the legality of his conviction, he was required to exhaust state remedies, regardless of the relief sought. As a prerequisite to obtaining the relief he requested, the court explained, petitioner would have to prove that he was wrongfully convicted. Id. at 3a.

Petitioner asserts that the Seventh Circuit's holding is inconsistent with the decisions of this Court and the decision of the Second Circuit in Mack v. Varelas, 835 F.2d 995 (2d Cir. 1987). According to petitioner, it is the relief sought by a prisoner in a federal action that dictates whether he must exhaust state remedies; the legal basis of the prisoner's claim is of no import. Each of petitioner's assertions is incorrect.

In Preiser v. Rodriguez, 411 U.S. 475 (1973), this Court explained that a prisoner's attack on the legality of his conviction lies within the very "core of habeas corpus." Id. at 489. Accordingly, "a state prisoner challenging his conviction must first seek relief in a state forum," notwithstanding that such claims may fall within the literal terms of section 1983. Ibid. Exhaustion of state remedies for attacks on the "fact or duration of confinement," this Court emphasized, is mandated by "considerations of federal-state comity," id. at 491, and "'a proper respect for state functions,'" ibid. (quoting Younger v. Harris, 401 U.S. 37, 44 (1971)). So uncontroverted is this principle that in Preiser, plaintiff-respondent conceded that a prisoner attacking the validity of his conviction must exhaust state remedies. Id. at 489-90.[2]

Moreover, the Court in Preiser grounded its analysis on both the nature of the prisoner's claim and the type of relief

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[2] See also Brief for Respondent at 12-13, Oswald v. Rodriguez, No. 71-1369, cert. granted, 407 U.S. 919 (1972).

sought.[3] In finding that exhaustion is required for those claims that lie at the core of habeas corpus, the Court did not, as petitioner contends, focus exclusively on the relief requested. Nor did the Court suggest that in determining the need for exhaustion the relief requested should be given any greater weight than the nature of the claim.[4]

It is true, as petitioner notes, that the Court in dictum commented that a prisoner's claim for damages would be cognizable under section 1983.[5] But this dictum, by its own terms, was limited to circumstances in which a prisoner does not attack the validity of his conviction. The Court's dictum, therefore, has no application here.

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[3] E.g. Preiser 411 U.S. at 489 (exhaustion required "in the case of a state prisoner's challenge to the fact or duration of his confinement"); id. at 490 ("In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity or the fact or length of their confinement, and that specific determination must override the general terms of § 1983.").

[4] Petitioner himself acknowledges this point but later retrenches, claiming, incorrectly, that the nature of the relief alone determines the necessity for exhaustion. Compare Pet. 12 ("Thus, the Court's holding [in Preiser] turned on both the nature of the prisoners' claim (a direct attack on the 'fact or duration' of their confinement) and the nature of the relief sought in the lawsuit.") (emphasis in original) with Pet. 16 ("In Preiser, Wolff, and Gerstein, then, the Court plainly instructed that the nature of relief sought in a federal lawsuit filed by a state prisoner is the critical factor in determining whether the lawsuit was properly characterized as a Section 1983 action, a habeas action, or both.") (emphasis in original).

[5] Preiser, 411 U.S. at 494 ("If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release -- the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy.").

Furthermore, contrary to petitioner's suggestion, nothing in Wolff v. McDonnell, 418 U.S. 539 (1974) or Gerstein v. Pugh, 420 U.S. 103 (1975) conflicts with the decision below. In Wolff, state prisoners initiated actions in federal court under section 1983, claiming that the procedures used by the parole board to revoke good-time credits were constitutionally defective. The prisoners sought an injunction to restore their good-time credits and damages to compensate them for the procedural due process violations. Consistent with its holding in Preiser, the Court held that the claims for damages were cognizable under section 1983 but the claims for injunctive relief were not. Wolff, 418 U.S. at 554-55. In Gerstein, pre-trial detainees who were arrested without a warrant claimed that the state's failure to provide them a prompt probable cause hearing violated the fourth and fourteenth amendments. In a brief footnote, the Court stated without elaboration that plaintiffs need not exhaust because they had not requested release from confinement. Gerstein, 420 U.S. at 107 n.6.

Thus, neither Wolff nor Gerstein had any occasion to address the exhaustion requirement where, as here, a prisoner attacks the legality of his conviction and also seeks damages based on the confinement itself. In Wolff and Gerstein, to provide prisoners with relief, a federal court need not have reviewed the propriety of a conviction or ordered release from confinement. For those reasons, the claims for monetary and injunctive relief in Wolff and Gerstein did not raise the federalism concerns present in

Preiser and here. The Seventh Circuit's decision, therefore, is entirely consistent with this Court's decisions.[6]

B. In light of this Court's clear teachings, it is hardly remarkable that in the twenty years since Preiser not a single federal court of appeals has adopted petitioner's approach. On the contrary, numerous lower court decisions have thoroughly considered and rejected the notion that a prisoner attacking the legality of a conviction need not exhaust state remedies, even where he seeks damages.[7] It bears emphasis, moreover, that this

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[6] If this Court had decided, as petitioner suggests, that a prisoner may maintain a damages claim under section 1983 attacking his conviction, then the Court's statement in Tower v. Glover, 467 U.S. 914 (1984) would have been meaningless. In Tower, the Court stated that it had "no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." Id. at 923. Significantly, following its comment, the Court cited, among other cases, Preiser and Meadows v. Evans, 529 F.2d 385, 386 (5th Cir. 1976), aff'd en banc, 550 F.2d 345 (5th Cir.), cert. denied, 434 U.S. 969 (1977), a decision that squarely holds that a prisoner may not sue for damages under section 1983 based on an attack on his conviction. Petitioner's contention, therefore, that the Court's comment in Tower has no relevance here, but is limited to an entirely different issue, is untenable. See Pet. 22. See also Young v. Kenny, 907 F.2d 875, 877-78 (9th Cir. 1990) ("Because the statement would make no sense if Wolff had resolved the question we face today, we presume that the Tower majority deliberately included it in its opinion to signal that the Court deems itself not to have ruled on our issue."), cert. denied, 498 U.S. 1126 (1991).

[7] See, e.g., Tedford v. Hepting, 990 F.2d 745, 748-49 (3d Cir.), cert. denied, 114 S. Ct. 317 (1993); Scruggs v. Moellering, 870 F.2d 376, 378-79 (7th Cir.), cert. denied, 1493 U.S. 954 (1989); Williams v. Hepting, 844 F.2d 138, 143-44 (3d Cir.), cert. denied, 488 U.S. 851 (1988); Spina v. Aaron, 821 F.2d 1126, 1127-28 (5th Cir. 1987); Feeney v. Auger, 808 F.2d 1279, 1281 (8th Cir. 1986); Leonard v. Hammond, 804 F.2d 838, 840 (4th Cir. 1986); Monk v. Secretary of Navy, 793 F.2d 364, 366-68 (D.C. Cir. 1986); Hadley v. Werner, 753 F.2d 514, 516 (6th Cir. 1985) (per curiam); Caldwell v. Line, 679 F.2d 494, 496 (5th Cir. 1982); Richardson v. Fleming,

Court consistently has denied petitions for certiorari in cases raising the precise issue presented here (including as recently as this Term), and nothing in the law has changed that would cause this issue to warrant the Court's review now. See supra note 7. If anything, the continued unanimity among the lower courts has further diminished the need for this Court's review.[8]

Petitioner is wrong when he asserts that the Seventh Circuit's decision conflicts with Mack v. Varelas, 835 F.2d 995 (2d Cir. 1987). Mack, in contrast to petitioner, "disclaimed any challenge to the validity of his conviction or the propriety of his custody" -- a fact found by the district court and reaffirmed by the court of appeals. Id. at 997. See id. at 999. Rather, Mack sought damages, claiming that the sheriff's failure to produce a witness at his trial violated his sixth amendment rights. Notably, the Second Circuit began its analysis by reiterating the principle applied by the Seventh Circuit here.

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651 F.2d 366, 372-73 (5th Cir. 1981); Franklin v. Webb, 653 F.2d 362, 363-64 (8th Cir. 1981); Hamlin v. Warren, 664 F.2d 29, 30-32 (4th Cir. 1981), cert. denied, 455 U.S. 911 (1982); Parkhurst v. State of Wyoming, 641 F.2d 775, 777 (10th Cir. 1981) (per curiam); Meadows v. Evans, 550 F.2d 345, 349 (5th Cir.) (en banc) (aff's per curiam, 529 F.2d 385 (5th Cir. 1976)), cert. denied, 434 U.S. 969 (1977); Fulford v. Klein, 529 F.2d 377, 381 (5th Cir. 1976); Guerro v. Mulhearn, 498 F.2d 1249, 1252-53 (1st Cir. 1974); accord Martin v. Merola, 532 F.2d 191, 194 (2d Cir. 1976).

[8] As petitioner points out, three of the early decisions produced isolated flickers of dissent, which by now have been completely extinguished. See Fulford, 529 F.2d at 383 (Tuttle, J., concurring in part and dissenting in part); Meadows, 550 F.2d at 349 (Tjoflat, J., concurring in part and dissenting in part); Hamlin, 664 F.2d at 33-34 (Winter, C.J., dissenting). In any event, this Court need not review this case to resolve the dispute between the majorities and dissents in those decisions. The circuit courts have long since resolved those disputes.

As the Second Circuit made clear, "A state prisoner may not bring a civil rights action in federal court under § 1983 to challenge either the validly of his conviction or the fact or duration of his confinement. Those challenges may be made only by petition for habeas corpus." Id. at 998. From there, the Second Circuit carefully examined both the nature of Mack's claim and the type of relief requested, concluding that because he was not attacking the validity of his conviction, nor was he seeking immediate or more speedy release, Mack could maintain his suit under section 1983 without exhausting state remedies. Ibid. The Court's detailed analysis of the nature of the claim and the relief requested caused it to conclude that Mack need not prove that he was wrongfully convicted in order to obtain money damages. Ibid. Here, by contrast, the very essence of petitioner's claim for damages is that the conviction was wrongful. The measure of his damages, moreover, are designed to compensate him for lost income cause by his allegedly improper confinement. Pet. App. 23a-25a. Thus, putting to one side that Mack does not even conflict with the Seventh Circuit's decision, Mack fails to support petitioner's broader proposition: that the type of relief requested is the sole determinant of the need for exhaustion.[9]

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[9] If that were not enough, Mack's entire discussion of the exhaustion requirement appears to be dictum. Mack did not appeal the district court's decision ordering him to exhaust. Mack only appealed the district court's decision to dismiss, rather than stay, his action, and the Second Circuit granted Mack's request. Id. at 998. Indeed, in Jewell v. County of Nassau, 917 F.2d 738 (2d Cir. 1990) (per curiam), the Second Circuit properly declined to replicate Mack's approach. In Jewell, the district court dismissed a section 1983 action by a prisoner attacking the

In a further effort to generate the appearance of confusion among the lower courts, petitioner cites several cases that, like Mack, present questions that are different than those raised here and that would not be resolved by review of this case. For example, petitioner suggests that the lower courts disagree about the scope of the required exhaustion, with the Fifth Circuit demanding exhaustion of both state and federal remedies. See Pet. 19 n.8. Since petitioner was not required to exhaust federal remedies, that conflict would not be resolved by review here, for petitioner does not have standing even to raise the issue.

In a similar vein, petitioner notes that in Gwin v. Snow, 870 F.2d 616, 623 (11th Cir. 1989) and Young v. Kenny, 907 F.2d 875, 877 (9th Cir. 1990), cert. denied sub nom. Bressman v. Farrier, 498 U.S. 1126 (1991) panels from the Eleventh and Ninth Circuits remarked in dicta that the requested relief should determine whether an action can lie under section 1983. But review here is not warranted simply to correct lower courts' dicta. More fundamentally, neither Gwin nor Young involved attacks on the validity of a conviction. Those decisions addressed challenges to the prisons' procedures for granting parole and compassionate leave and for awarding sentence credits, respectively.

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legality of his conviction, finding the prisoner was required to exhaust. As in Mack, Jewell appealed only the district court's order to dismiss, rather than stay, his claim. Accordingly, the Second Circuit did not address the exhaustion question.

Indeed, questions regarding the applicability of the exhaustion requirement for prisoners' claims under section 1983 arise in a myriad of contexts, including challenges to place of confinement, conditions of confinement, procedures for reduction of good-time credits, procedures for post-conviction review, detainers, extradition, pre-trial custody, and probation.[10] Each type of claim raises its own unique questions regarding the federalism concerns animating the exhaustion requirement and the intent of Congress. Thus, to the extent that any confusion exists in the lower courts regarding the exhaustion requirement for challenges other than those involving the validity of a conviction, this case would be a poor vehicle for resolving that confusion. This Court's review is not warranted.

3. There Is No Reason to Review the Seventh Circuit's Decision to Dismiss, Rather than Stay, Petitioner's Section 1983 Action.

Although the Seventh Circuit's decision that petitioner's claim should be dismissed, rather than stayed, arguably conflicts with decisions of other circuits, review of that issue at this time and in this case is not warranted for several reasons.

The Seventh Circuit's decision is the first to hold that a

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[10] See, e.g., Kirby v. Dutton, 794 F.2d 245 (6th Cir. 1986) (procedures for post-conviction review); Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984) (parole); Stevens v. Heard, 674 F.2d 320 (5th Cir. 1982) (detainer); Brown v. Nutsch, 619 F.2d 758 (8th Cir. 1980) (extradition); Waste Management of Wisconsin v. Fokakis, 614 F.2d 138 (7th Cir.) (fines without imprisonment), cert. denied, 449 U.S. 1060 (1980); Wright v. Cuyler, 624 F.2d 455 (3d Cir. 1980) (conditions of confinement); Williams v. Ward, 556 F.2d 1143 (2d Cir.) (procedural due process), cert. dismissed, 434 U.S. 944 (1977).

prisoner's claim under section 1983 that requires exhaustion should be dismissed and that equitable tolling should be applied, if appropriate, when the prisoner refiles. The freshness of this conflict is itself good reason to decline further review now.

There is some probability that Congress will resolve this issue, particularly if it is as important as petitioner suggests. After all, as petitioner acknowledges, Congress has recently demonstrated its willingness to address questions surrounding exhaustion for claims under section 1983. See 42 U.S.C. § 1997e.

In the meantime, there is no pressing need to review the issue presented here. For those prisoners who exhaust diligently and in good faith, there is little, if any, practical difference between the approach adopted by the Seventh Circuit and that of other circuits. What is more, the approach of the Seventh Circuit was clearly the proper one, so there is no reason to correct this particular ruling.

The purpose behind the two approaches is identical: to protect prisoners, who have diligently exhausted state remedies, from a statute of limitations defense to meritorious section 1983 actions. The stay, however, is a blunter tool. As the Seventh Circuit explained, an automatic stay "gives inadequate weight to the policy of the statute of limitations, which is to bar stale suits. Should Heck dawdle in exhausting his state remedies, this suit might resume almost a decade after the statute of limitations had expired." Pet. App. 3a. Thus, the Seventh Circuit's approach of providing for equitable tolling at once

recognizes the concerns of prisoners and preserves the policies of the statutes of limitations.

Petitioner inaccurately asserts that the Seventh Circuit's rule will result in additional litigation over disputes about tolling. There is no sound basis to conclude that the resources needed to adjudicate the applicability of a tolling provision are any greater than those required to adjudicate stale claims.

Nor is petitioner correct that the Seventh Circuit's approach conflicts with Deakins v. Monaghan, 484 U.S. 193 (1988). As petitioner points out, Deakins commented that federal courts have an "unflagging obligation . . . to exercise the jurisdiction given." Id. at 204 (citation and quotation omitted; ellipsis in original). But this Court in Preiser held that habeas corpus is the "exclusive remedy" for cases such as this, thus concluding that jurisdiction has not been given to adjudicate claims under section 1983 prior to exhaustion of state remedies required for habeas relief. 411 U.S. at 489. Review of this issue is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 15, 1993

William K. Suter
Clerk
Supreme Court of the United States
One 1st Street, N.E.
Washington, D.C. 20543

Re: Heck v. Humphries, No. 93-6188

Dear Mr. Suter:

I have enclosed for filing twelve type-written copies of Brief for the Respondents in Opposition and a certificate of service in the above-referenced case. I have also included an appearance form that substitutes as counsel of record Matthew R. Gutwein for Wayne E. Uhl.

Thank you.

Sincerely

Matthew R. Gutwein

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-6188

ROY HECK,

Petitioner,

v.

JAMES HUMPHREY, et al.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1993, I served one copy of the Brief of the Respondents in Opposition, as required by Rule 29.3 of the Rules of this Court, by depositing that document in the United States mail, postage prepaid and properly addressed to the following counsel for the petitioner:

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SUPREME COURT OF THE UNITED STATES

No. 93-6188

Roy Heck (Petitioner or Appellant) vs. James Humphries, et al. (Respondent or Appellee)

The Clerk will enter my appearance as Counsel of Record for James Humphries, Robert Ewbank, Michael Krinoph

(Please list names of all parties represented)

who IN THIS COURT is ☐ Petitioner(s) ☒ Respondent(s) ☐ Amicus Curiae ☐ Appellant(s) ☐ Appellee(s)

I certify that I am a member of the Bar of the Supreme Court of the United States:

Signature _____

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Rule 9

APPEARANCE OF COUNSEL

.1. An attorney seeking to file a pleading, motion, or other paper in this Court in a representative capacity must first be admitted to practice before this Court pursuant to Rule 5. The attorney whose name, address, and telephone number appear on the cover of a document being filed will be deemed counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record must be clearly identified.

.2. An attorney representing a party who will not be filing a document must enter a separate notice of appearance as counsel of record indicating the name of the party represented. If an attorney is to be substituted as counsel of record in a particular case, a separate notice of appearance must also be entered.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

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ROY HECK,

Petitioner,

v.

JAMES HUMPHREY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

No. 93-6188

ROY HECK,

Petitioner,

v.

JAMES HUMPHREY, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITIONER'S REPLY BRIEF

The petition in this case presents two questions: (1) whether a federal court may require a state prisoner to exhaust state habeas corpus remedies before litigating a 42 U.S.C. § 1983 claim for money damages and, (2) if so, whether the court should dismiss, rather than stay, the Section 1983 claim pending exhaustion. Respondents acknowledge (as did the Seventh Circuit below) that the courts of appeals are in conflict on the second of these questions. As for the first, respondents' arguments against review are premised on a misreading both of this Court's decisions and of a holding of the Second Circuit that squarely conflicts with the decision below. Indeed, the Court recently granted review in a

similar case raising a question about the relationship between Section 1983 and state habeas corpus, but was forced to dismiss the writ as improvidently granted because of impending mootness. In these circumstances, further review plainly is warranted.

1. At the outset, respondents are wrong in arguing (Br. in Opp. 8-9) that review should be denied because principles of issue preclusion would prevent petitioner from prevailing on the merits of his Section 1983 claim. Needless to say, this argument puts the cart before the horse: the questions now before the Court go only to whether petitioner is entitled to have his claim heard at all. Speculation about the possible outcome on the merits if petitioner is permitted to proceed does not justify a refusal to review a decision that bars petitioner from the courthouse altogether.

In any event, the factual and legal premises of respondents' contention are incorrect. Petitioner has not, as respondents assert, "twice litigated the allegations contained in his section 1983 action." Br. in Opp. 8. In fact, several of the claims advanced in petitioner's Section 1983 suit -- for example, that respondents destroyed exculpatory evidence -- were neither advanced nor resolved either on direct appeal or in petitioner's federal habeas action. Compare Pet. App. 12a-16a (addressing petitioner's claims on direct appeal) and App., infra, 1a-6a (petitioner's habeas corpus petition) with Pet. App. 21a-23a (Section 1983 complaint). And principles of issue preclusion recognized by the Indiana courts bar the litigation only of those question that were actually adjudicated in a prior proceeding. See Sullivan v.

American Casualty Co., 605 N.E.2d 134, 137 (Ind. 1992) (emphasis added) ("collateral estoppel operates to bar subsequent relitigation of the same fact or issue where that issue was necessarily adjudicated in a former suit and the same fact or issue is presented in a subsequent lawsuit"). See generally Hazard & James, Civil Procedure § 11.16-11.17 (1985).1/ The assertion of petitioner's claims therefore will not be barred by the doctrine of issue preclusion.

2. Respondents' arguments against review of the second question presented in the petition are remarkably unenthusiastic. Respondents do not deny that there is a conflict in the circuits on the issue. They do not deny that the question is a recurring and important one. And they do not deny that the issue warrants the Court's consideration whether or not the Court grants review of the first question presented in the petition.

Instead, respondents suggest that the conflict in the courts of appeals is too "fresh[]" to warrant review. Br. in Opp. 18. That argument is insubstantial. On the one hand, 10 circuits have now addressed the question whether a Section 1983 action should be stayed or dismissed pending exhaustion (see Pet. 26-27), so that

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1/ In mistakenly asserting that a court adjudicating petitioner's Section 1983 action "would accord preclusive effect to those issues that petitioner had the opportunity to litigate" (Br. in Opp. 8 (emphasis added)), respondents evidently confuse the requirement of actual adjudication with the additional requirement that "the party against whom the prior judgment is pled had a full and fair opportunity to litigate the issue." Sullivan, 605 N.E.2d at 138. Collateral estoppel does not apply when an issue was not decided in the prior case, whether or not one of the parties could have litigated it. See generally id. at 137-138.

there hardly is a need for further percolation among the lower courts; on the other, there is no prospect that the Seventh Circuit -- which refused (over three dissenting votes) to grant rehearing en banc -- will change its view. The issue therefore plainly is ripe for this Court's consideration. Respondents are similarly misguided in proposing (Br. in Opp. 18) that, because Congress has "recently" addressed exhaustion requirements for prisoner Section 1983 lawsuits, the problems posed by the decision below should be left for congressional correction. In fact, Congress last legislated in this area almost 15 years ago with the enactment of CRIPA (see Pet. 23). And it is, of course, the responsibility of this Court, rather than of Congress, to resolve conflicts among the courts of appeals.

Respondents also are incorrect in asserting (Br. in Opp. 18) that for "prisoners who exhaust diligently" there is "little, if any, practical difference" between the Seventh Circuit's rule and the approach taken by other courts of appeals. As Judge Kozinski has explained for the Ninth Circuit, "[e]xhaustion of state remedies is a process that may take years to complete; it is not farfetched to contemplate that a prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim." Young v. Kenney, 907 F.2d 874, 878 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991). This means, as we explained in the petition (at 30, 32-34), that under the Seventh Circuit's rule even prisoners who proceed diligently and in good faith sometimes will find their claims time-barred -- and will, at a minimum, be

subjected to a wasteful and burdensome round of procedural litigation that is not required by other courts of appeals.2/ Respondents have no response to this point.3/

Finally, respondents are wrong in contending (Br. in Opp. 19) that the decision below does not conflict with Deakins v. Monaghan, 484 U.S. 193 (1988). For present purposes, it is enough to note that three other courts of appeals have held that the rationale of Deakins applies in the circumstances of this case. See Pet. 35. Respondents do not deny that the Seventh Circuit's holding is irreconcilable with those decisions.

3. In opposing review of the first question presented in the petition, respondents contend principally that Preiser v. Rodriguez, 411 U.S. 475 (1973), Wolff v. McDonnell, 418 U.S. 539 (1974), and Gerstein v. Pugh, 420 U.S. 103 (1975), require

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2/ That surely will be the case in this suit. As respondents note (Br. in Opp. 5-6), petitioner has now been deemed to have exhausted his state post-conviction remedies and has initiated a second Section 1983 action, which he will attempt to prosecute if this action is held to have been properly dismissed rather than stayed. But if this Court denies review (thus terminating petitioner's first Section 1983 action), the second Section 1983 suit undoubtedly will be met by a statute of limitations defense. Indeed, respondents pointedly do not suggest that they will refrain from arguing the statute of limitations as a bar to the second suit.

3/ Respondents do deny (Br. in Opp. 19) that use of the Seventh Circuit's elaborate equitable estoppel analysis will consume more resources than a consideration of the merits of prisoner suits. This Court itself has noted, however, that "[o]ur experience teaches us that the vast majority of prisoner cases are resolved on the complaint alone. Of those prisoners whose complaints survive initial dismissal, few attempt discovery and fewer still actually obtain it." Cleavinger v. Saxner, 474 U.S. 193, 208 (1985). In contrast, the Seventh Circuit's approach will require in every case an analysis of state equitable tolling law and then a fact-specific inquiry into the circumstances of the suit. See Pet. 33.

exhaustion of state post-conviction remedies prior to the commencement of a Section 1983 action that -- as assertedly is the case here -- "attacks the legality of [the prisoner's] conviction." Br. in Opp. 12. See id. at 10-13. But this assertion is premised on a misreading of the cases. In holding that a prisoner must exhaust state remedies before bringing a Section 1983 action challenging the validity of his conviction, the Court in Preiser plainly had in mind only challenges that sought release as a remedy. The Court said so expressly: it explained that "[i]f a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release -- the traditional purpose of habeas corpus." Preiser, 411 U.S. at 494 (emphasis added). And the Court made clear repeatedly that "the core of habeas corpus" involves a challenge to "the very duration of * * * physical confinement itself." Id. at 487-488.4/ The Preiser Court thus expressly contemplated that a prisoner who seeks damages for unconstitutional action that led to his conviction need not exhaust state remedies.

4/ See, e.g., 411 U.S. at 488 n.8 (habeas corpus is intended "to deal with such attacks on physical custody"); id. at 489 (emphasis added) (habeas corpus addresses the "validity of [the prisoner's] confinement," the "fact or duration of his confinement," and "goes directly to the constitutionality of his physical confinement itself and seeks either immediate release from further confinement or the shortening of its duration"); id. at 500 ("We hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus").

Indeed, the distinction advanced by respondents -- which would bar a Section 1983 action that somehow raises doubts about the validity of the plaintiff's conviction, while allowing other constitutional challenges to proceed -- makes sense only if a judgment for the plaintiff in a Section 1983 damages action could have a res judicata or collateral estoppel effect in a subsequent habeas action seeking release. But that is not the case. As we explained in the petition (at 24-25), a judgment against state officials in their individual capacities for money damages cannot be used to estop the state in a subsequent habeas action seeking release. Respondents do not deny this point, and offer no other justification for their strained reading of Preiser.5/

For similar reasons, respondents are incorrect in asserting (Br. in Opp. 14-15) that the decision below does not conflict with Mack v. Varelas, 835 F.2d 995 (2d Cir. 1987). Mack was a Section 1983 action involving a Sixth Amendment claim for money damages that was premised on the defendant sheriff's failure to produce a trial witness. While respondents assert that the Second Circuit found that the prisoner in Mack "was not attacking the validity of his conviction" (Br. in Opp. 15), that is true only in the sense

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5/ The invalidity of respondents' distinction is confirmed by the Court's decision in Gerstein. As respondents themselves note (Br. in Opp. 12), that case involved a claim by pre-trial detainees that their detention without a probable cause hearing violated the Fourth Amendment. Although this contention obviously called into question the legality of the detainees' confinement -- just as respondents assert petitioner's claim in this case calls into question the validity of his conviction -- the Court held that the detainees' Section 1983 claim could proceed "[b]ecause release was neither asked nor ordered." Gerstein, 420 U.S. at 107 n.6.

that the prisoner did not seek release. In fact, his complaint asserted that the failure to produce the witness "'caus[ed] [him] to be convicted and incarcerated,'" and he therefore demanded "damages for each day of his ordered confinement." Mack, 835 F.2d at 998. This case, in which petitioner seeks damages for destruction of exculpatory evidence, is essentially identical.6/

Finally, respondents assert (Br. in Opp. 13-14) that, as recently as this Term, the Court has denied petitions for certiorari raising the first issue presented here. In fact, in Cavanaugh v. Roller, No. 92-1510, the Court recently granted a petition presenting a very similar issue; the Court was forced to dismiss the writ as improvidently granted, however, because events occurring after the grant of certiorari promised to render the case moot. See generally Cavanaugh v Roller, No. 92-1510, oral arg. tr. 3-8; Cavanaugh v. Roller, No. 92-1510 (Nov. 30, 1993) (dismissing cert. as improvidently granted).7/

Cavanaugh involved a prisoner's Section 1983 challenge to South Carolina's parole release system; the first question presented in the petition was whether the suit could proceed under Section 1983 or whether the prisoner's claim "reached the very 'core of habeas corpus' and, as such, required the petitioner to exhaust his remedies in the state courts of South Carolina before proceeding to the federal courts." Cavanaugh v. Roller, No. 92-1510, Pet. 1. The Court's decision to grant review in Cavanaugh presumably reflects a recognition that additional guidance is needed on the question, as the petition in that case put it, "[h]ow to sort through the frustrating conflict between the civil rights and habeas corpus remedies for state prisoners." Pet. 21. The

---

6/ Respondents claim that here, in contrast with Mack, the essence of the "claim for damages is that the conviction was wrongful." Br. in Opp. 15. But the cases are not distinguishable on that ground: the argument in Mack, as we note above, was that the wrongful failure to produce a witness caused the prisoner's conviction and incarceration. Respondents also complain that the measure of petitioner's requested damages is "designed to compensate him for lost income cause[d] by his allegedly improper confinement." Ibid. But that contention, even if true (in fact, petitioner seeks both lost income and compensation for the violation of his constitutional rights, see Pet. App. 25a), hardly serves to distinguish Mack, where the plaintiff sought compensation for every day of past and prospective confinement. See 835 F.2d at 997, 998. Finally, respondents are incorrect in asserting (Br. in Opp. 15-16 n.9) that the Second Circuit's extensive discussion of exhaustion in Mack was dictum. To the contrary, the court's holding in Mack that "[t]reatment of the complaint as a petition for habeas corpus was * * * not proper" was the essential foundation for its further conclusion that "the case should not have been dismissed for lack of exhaustion." Id. at 999.

7/ In contending that the Court recently denied review of the issue presented here, respondents have in mind Tedford v. Hepting, cert. denied, 114 S. Ct. 317 (1993). See Br. in Opp. 13 n.7. That case, however, differed in crucial respects from this one. In Tedford, the prisoner brought a Section 1983 action claiming that the transcripts of his trial had been improperly altered, adversely affecting his prospects on appeal. He sought not only damages, but also injunctive relief in the form of an order correcting the trial record. See Tedford v. Hepting, 990 F.2d 745, 746, 747 (3d Cir. 1993). When his claim was dismissed, he sought certiorari. He acknowledged in his petition to this Court, however, that the modified records would be used to challenge his conviction and that "'[t]he conclusion is inescapable that plaintiff seeks to use this action as a device to secure his release from confinement.'" Pet. 16 (citation omitted). In contrast, as we have explained -- and as respondents nowhere deny -- the Section 1983 action in this case cannot have even collateral effects on petitioner's continued confinement. The decision below therefore is in direct conflict with Preiser, Wolff, Gerstein, and Mack; the decision in Tedford was not.

Court's inability to render a decision in Cavanaugh makes the need for review in this case especially pressing.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES ROTHFELD*
ALAN UNTEREINER
GARY WINTERS
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006-1882
(202) 778-0616

*Counsel of Record

DECEMBER 1993

APPENDIX

FILED
JAN 22 1991
RICHARD E. TIMMONS, CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

S91-00040

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District Northern	
Roy Heck, Sr.	Prisoner No. 874376	Docket No.

Place of Confinement: Westville Correctional Center
P.O. Box 473/dorm. O-1
Westville, Indiana 46391-0473

Name of Petitioner (include name upon which convicted): Roy Heck, Sr.

Name of Respondent (authorized person having custody of petitioner): v. Thomas D. Richards

Attorney General of the State of: Indiana-Linley E. Pearson

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Dearborn Circuit Court, Lawrenceburg, Indiana

2. Date of judgment of conviction: July 30th, 1987

3. Length of sentence: Fifteen Years

4. Nature of offense involved (all counts): Murder-found guilty of Voluntary Manslaughter

5. What was your plea? (Check one)
(a) Not guilty ☒
(b) Guilty ☐
(c) Nolo contendere ☐
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:
N/A

6. Kind of trial: (Check one)
(a) Jury ☒
(b) Judge only ☐

7. Did you testify at the trial?
Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?
Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court: Indiana Supreme Court

(b) Result: Affirmed

(c) Date of result: April 6th, 1990

(d) Grounds raised: 1. Insufficient evidence) 2. Conviction was contrary to law in pre-trial voice identification being impermissability suggestive. 3.) Judgement was contrary to law dur to prejudicial irrevelent hearsay testimony of state's witnesses.) 4.) The court errored in allowing rebuttal testimony of Roberta Heck) 5.) The court abused its descretion in allowing testimony of states rebuttal witnesses after being on notice of the seperation order being violated.) 6) The court errored in allowing testimony of officer Kreimop regarding his actions after over hearing a telephone conversation of the defendant.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: Northern District Court under cause S90-305

(2) Nature of proceeding: Petition for writ of habeas corpus 28 U.S.C. 2254

(3) Grounds raised: same as listed herein with the exception of ground (3) which was removed due to being unexhausted

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result: Dismissed without prejudice

(6) Date of result: January 7th, 1991

(b) As to any second petition, application or motion give the same information:

(1) Name of court: N/A

(2) Nature of proceeding: N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result N/A

(6) Date of result N/A

(c) As to any third petition, application or motion, give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result N/A

(6) Date of result N/A

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐
(2) Second petition, etc. Yes ☐ No ☐
(3) Third petition, etc. Yes ☐ No ☐ N/A

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not

N/A

5. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession.
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(j) Denial of right of appeal.

A. Ground one: Conviction was obtained without evidence sufficient to support a conviction of Voluntary Manslaughter.

Supporting FACTS (tell your story *briefly* without citing cases or law): The evidence presented failed to establish petitioner inflicted any injury which may have caused the decedent's death or any action which could be considered as a deliberit intent to do so: Further, the cause of death was not established; The petitioner does not feel that a blow hard enough to fracture a jaw would cause death to any person, which would not make this an adequate cause of death.

B. Ground two: Conviction was obtained by illegal over suggestive voice identification.

Supporting FACTS (tell your story *briefly* without citing cases or law): State's witness, Tessie Standriff, (18) months after the alleged incident, and one (1) week prior to petitioner's trial, requested to hear a tape recording of petitioner's voice; Authorities provided such with the petitioner. During petitioner's trial Standriff identified his voice on a tape recording, and testified that authorities told her it was the petitioner's voice prior to her listening to the tape. As reference, see attached exhibit A

C. Ground three: In abusing its discretion, the trial court violated petitioner's right to a fair trial.

Supporting FACTS (tell your story *briefly* without citing cases or law): The monumental amount of hearsay testimony was labled as " state of mind " of either the petitioner or the decedent, all of which acted to prejudice the jury and amounted to a probability that the petitioner is the one who took the decedent's life.

D. Ground four Evidence was illegally obtained, used and presented to the jury.

Supporting FACTS (tell your story *briefly* without citing cases or law): Police officer Michael Kreinhop, was allowed to testify in depth concerning his actions after " eavesdropping " on petitioner's telephone call from the Dearborn County Jail, which was suppose to be a private phone. This testimony was highly prejudicial to the petitioner before the jury.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:
(a) At preliminary hearing Joseph Votaw III. 230 west High St. Lawrenceburg, In. 47205 (812) 537-4500

(b) At arraignment and plea " same as above "

(c) At trial Joseph Votaw III. and John Darnette

(d) At sentencing Joseph Votaw III. and John Darnette

(e) On appeal Kathleen A Dayson 6050 East 10th St. Indianapolis, In 46219 (317) 352-1251

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒
(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) Give date and length of the above sentence: August 18th, 1987 sentenced to an executed term of fifteen (15) years

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

Jan. 14, 1991
(date)

Roy Heck Sr.
Signature of Petitioner

(5)

Supreme Court, U.S.
FILED
FEB 18 1994
OFFICE OF THE CLERK

No. 93-6188

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROY HECK,
Petitioner,

v.

JAMES HUMPHREY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

CHARLES ROTHFELD *
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Indianapolis, IN 46204
(317) 232-6201

Counsel for Respondents

* Counsel of Record

PETITION FOR CERTIORARI FILED SEPTEMBER 29, 1993
CERTIORARI GRANTED JANUARY 14, 1994

85pp

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RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
December 27, 1988	§ 1983 Complaint filed
February 1, 1989	Opinion and Judgment of the United States District Court for the Southern District of Indiana Dismissing § 1983 Action filed
April 6, 1990	Opinion of the Supreme Court of Indiana Affirming Petitioner's Conviction filed
June 19, 1990	First Habeas Corpus Petition in the United States District Court for the Northern District of Indiana filed
January 7, 1991	Order of the United States District Court for the Northern District of Indiana Dismissing First Habeas Corpus Petition filed
January 22, 1991	Second Habeas Corpus Petition in the United States District Court for the Northern District of Indiana filed
July 31, 1991	Opinion and Judgment of the United States District Court for the Northern District of Indiana Denying Second Ha- Corpus Petition filed
September 18, 1992	Order and Judgment of the United States Court of Appeals for the Seventh Circuit Affirming Dismissal of Second Habeas Petition filed
July 1, 1993	Opinion of the United States Court of Appeals for the Seventh Circuit Affirming Dismissal of § 1983 Action filed
November 3, 1993	Order of the United States District Court for the Southern District of Indiana Granting In Forma Pauperis Status and Ordering Clerk to File Second § 1983 Complaint filed
November 8, 1993	Second § 1983 Complaint filed

Form to be used by persons in filing a complaint pro se under the Civil Rights Act, 42 USC 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Civil No. ———

ROY HECK,
Plaintiff

v.

JAMES HUMPHREY, DEARBORN COUNTY PROSECUTOR; ROBERT EWBANK, ATTRONEY; and MICHEAL KRINOPH, INDIANA STATE POLICE INVESTIGATOR; ALL IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES AS SUCH,
Defendants

COMPLAINT

A. Have you begun other actions in state or federal court dealing with the same facts involved in this action or otherwise relating to your claim?

YES ( ) NO (X)

B. If your answer to A is yes, describe the action in the space below. (If there is more than one action, describe the additional actions on the reverse side of this page).

1. Parties to the Action: ———
2. Court (if federal court, name the district; if state court name the county):
3. Docket number: ———

4. Name of judge who heard case: ———
5. Disposition (For example, was the case dismissed? Was it appealed? Is it still pending?)

If you are imprisoned in a state penal institution, then answer C: 1, 2 and 3:

C. 1. Did you present this complaint to the state prison grievance procedure?

YES ( ) NO (X)

2. If your answer is yes, what was the result?

3. If your answer is no, please explain.

THIS IS NOT A PRISON MATTER

PARTIES

(Place your full name in the first blank in paragraph 1. In the second blank, place your present address. Do the same for additional plaintiffs, if any).

1. The plaintiff is ROY HECK #874376, WESTVILLE CORRECTIONAL CENTER, WESTVILLE, INDIANA 46391
2. Plaintiff's address (and prison number) is: SEE ABOVE

CAUSE OF ACTION

D. I allege that the following of my constitutional rights, privileges or immunities have been violated:

Allegation 1: DEFENDANTS JAMES HUMPHREY, ROBERT EWBANK, AND MICHAEL KRINOPH, ACTING UNDER COLOR OF STATE LAW, CONSPIRED AND/OR ACTED IN CON-

CERT WITH A MEETING OF THE MIND TO SUBJECT PLAINTIFF HECK TO AN ILLEGAL INVESTIGATION IN VIOLATION OF THE FOURTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, AND 42 U.S.C. 1983, 1985(2), 1986, 2: AND 1988.

E. The following facts form the basis for allegations listed above in D. (Include all of the facts you consider important, and state them clearly and in your own words—but do NOT make legal arguments or citations).

Allegation 1:

"SEE ATTACHED SHEET FOR FACTS IN SUPPORT"

Allegation 2:

Allegation 3:

(If you need more space to explain any allegation or to list additional facts, use the other side of this sheet, or attach an additional sheet.)

REQUEST FOR RELIEF

1. I DO request that I be allowed to commence this action without prepayment of fees and costs, or security therefore, pursuant to 28 U.S.C. 1915. The affidavit of indigency below has been completed and is submitted in support of this request for leave to proceed in forma pauperis.

SUPPORTING FACTS TO MY ALLEGATION AGAINST DEFENDANTS JAMES HUMPHREY, ROBERT EWBANK, AND MICHAEL KRINOPH.

BETWEEN MAY AND JULY, 1987:

1. DEFENDANTS HUMPHREY, EWBANK, AND KRINOPH, AFTER CONDUCTING A SEARCH IN 1986 OF MY DECEASED WIFE'S TRAILOR HOME, TOOK ITEMS FROM HER RELATIVES AND USED THEM IN THEIR UNLAWFUL, UNREASONABLE, AND ARBITRARY INVESTIGATION OF ME BECAUSE THEY, TOGETHER THROUGH AGREEMENT, UNDERSTANDING, AND CONTROL BELIEVED ME TO BE RESPONSIBLE FOR HER DEATH.

2. THEY ALSO ARBITRARILY, UNLAWFULLY, UNREASONABLY AND KNOWINGLY DESTROYED CLOTHING FROM MY DECEASED WIFE'S BODY WHICH WAS EXCULPATORY IN NATURE AND COULD HAVE PROVED MY INNOCENCE OF THIS CRIME.

3. THESE NAMED DEFENDANTS DIRECTED IN CONCERT WITH A MUTUAL UNDERSTANDING AND AGREEMENT AN ILLEGAL AND UNLAWFUL VIOCE IDENTIFICATION PROCEDURE (3) TIMES WITH A POTENTIAL STATE WITNESS, WITHOUT MY OR MY ATTORNEY'S PRESENCE TO FURTHER THE OBJECTIVES OF SAID CONSPIRACY AGAINST ME.

4. ALL OF THE DEFENDANTS ACTIONS WERE PRELIMINARY POLICE INVESTIGATIVE ACTIVITY TO GATHER EVIDENCE ILLEGALLY AND BY ANY MEANS NECESSARY TO CHARGE ME WITH THE CRIME OF KILLING MY WIFE.

5. AT ALL TIMES DURING THIS UNLAWFUL, UNREASONABLE, AND ARBITRARY INVESTIGATION THE DEFENDANTS KNEW PLAINTIFF HAD CLEARLY ESTABLISHED U.S. CONSTITUTIONAL AND STATUTORY RIGHTS TO BE FREE FROM THIS TYPE OF ILLEGAL CONDUCT BY PUBLIC OFFICIALS YET THEY OVERRIDED THEM IN CONCERT.

6. BOTH THE DEFENDANTS HUMPHREY AND EWBANK, EVEN THOUGH COUNTY PROSECUTORS AT SAID TIME, WERE ACTING AS "POLICE INVESTIGATORS", AND NOT FUNCTIONING IN THEIR QUASI-JUDICIAL CAPACITIES AGAINST THE PLAINTIFF.

7. ALL OF THE NAMED DEFENDANTS HAD PRIOR KNOWLEDGE OF THE WRONGS CONSPIRED TO BE DONE AGAINST THE PLAINTIFF, AND HAVING POWER TO PREVENT OR AID IN THE PREVENTING THE COMMISSION OF SAME, NEGLECTED OR REFUSED TO DO ANYTHING TO PREVENT THE PLAINTIFF'S CIVIL RIGHTS FROM BEING VIOLATED.

2. I believe that I am entitled to the following relief:

SEE ATTACHED COPY

/s/ Roy Heck #874376
(Signature)
P.O. Box 473
Westville, Ind. 46391
(Address)

PLAINTIFF BELIEVES HE IS ENTITLED TO THE FOLLOWING RELIEF:

A) A DECLARATORY JUDGEMENT PURUANT TO 28 U.S.C.A. 2201-2202, DECLARING WHETHER OR NOT DEFENDANTS VIOLATED PLAINTIFF'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS NOT TO BE SUBJECT TO AN ILLEGAL CRIMINAL INVESTIGATION.

B) COMPENSATION IN THE AMOUNT OF $300,-000.00, FROM EACH NAMED DEFENDANT FOR VIOLATING PLAINTIFF'S CIVIL RIGHTS AND HIS LOSSES INCURED FROM HIS EMPLYMENT AND FARM OPERATIONS.

C) PUNITIVE DAMAGES IN THE AMOUNT OF #300,000.00 FROM EACH NAMED DEFENDANT FOR VIOLATING PLAINTIFF'S CIVIL RIGHTS.

D) INTEREST AND COSTS INCURRED IN LITIGATING THIS ACTION IF PLAINTIFF SHOULD PREVAIL ON ANY OF HIS CLAIMS.

E) ATTORNEY FEES AWARD IF PLAINTIFF PREVAILS ON ANY OF HIS CLAIMS.

AFFIDAVIT

STATE OF INDIANA)
) ss:
COUNTY OF LAPORTE)

Before me the undersigned in and for the said county and state presently appeared ROY HECK, plaintiff in the within action who, being first duly sworn according to law, deposes and says that the facts set forth in the foregoing complaint are true of his own knowledge, except as to those matters that are stated in it on his information and belief, and as to those matters he believes them to be true:

/s/ Roy Heck #874376
(Signature of affiant-plaintiff)

SUBSCRIBED AND SWORN TO BEFORE ME, THIS 21 DAY OF DECEMBER, 1988.

/s/ Robert J. Budak
Notary Public or other person authorized
by law to administer oaths.

(Notary Stamp Omitted in Printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Docket No. NH 88-209-C

ROY HECK

v.

JAMES HUMPHREY, *et al.*

APPLICATION TO PROCEED IN FORMA PAUPERIS, SUPPORTING DOCUMENTATION & ORDER

I, ROY HECK, declare that I am the (*check appropriate box*)

☒ petitioner/plaintiff

☐ respondent/defendant

☐ movant (filing 28 U.S.C. 2255 motion)

☐ _____
other

in the above-entitled proceeding; that, in support of my request to proceed without being required to prepay fees, cost or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or give security therefor; that I believe I am entitled to relief. The nature of my action, defense, or other proceeding or the issues I intend to present on appeal are briefly stated as follows: 42 U.S.C. 1983, 1985(2) 1986, 1988, ACTION FOR DEPRIVATION OF MY FOURTH AND FOURTEENTH AMENDMENT RIGHTS TO BE FREE FROM AN ILLEGAL INVESTIGATION AND DUE PROCESS.

In further support of this application, I answer the following questions.

1. Are you presently employed?

   Yes ☐ No ☒

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer, (list both gross and net salary)

   INCARSERATED INMATE/$13.00/MONTH

   b. If the answer is "no," state the date of last employment and the amount of the salary and wages per month which you received.

   AUGUST 12, 1986

   $800.00/MONTH

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or other form of self employment — Yes ☐ No ☒

   b. Rent payments, interest or dividends? — Yes ☐ No ☒

   c. Pensions, annuities or life insurance payments? — Yes ☐ No ☒

   d. Gifts or inheritances? — Yes ☐ No ☒

   e. Any other sources? — Yes ☐ No ☒

If the answer to any of the above is "yes," describe each source of money and state the amount received from each during the past twelve months.

3. Do you own any cash, or do you have money in checking or savings account?

   Yes ☐ No ☒

   (Include any funds in prison accounts.)

   If the answer is "yes," state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

   Yes ☐ No ☒

   If the answer is "yes," describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

   NONE

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 12/16/88 (Date)

/s/ Roy Heck #874376
Signature of Applicant

CERTIFICATE
(Prisoner Accounts Only)

I certify that the applicant herein has the sum of $29.16 on account to his credit at the _____ institution where he is confined. I further certify that the applicant likewise has the following securities to his credit according to the records of said institution _____

_____

_____

/s/ Ofc. Budak
Authorized Officer of Institution

ORDER OF COURT

The application is hereby denied

_____ _____

United States Judge Date

The application is hereby granted. Let the applicant proceed without prepayment of cost or fees or the necessity of giving security therefor.

_____ _____

United States Judge or Magistrate Date

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Cause No. NA 88-209-C

ROY HECK,

Plaintiff,

v.

JAMES HUMPHREY, Dearborn County Prosecutor, ROBERT EWBANK, Attorney, MICHAEL KRINOPH, Indiana State Police Investigator; All in their Official and Individual Capacities,

Defendants.

ENTRY

This cause is before the Court on the complaint of Roy Heck and on his Application to Proceed *in forma pauperis*. The Court, having read and examined such Application and the complaint, and being duly advised, now makes its ruling.

Plaintiff Roy Heck is confined at the Westville Correctional Center. He brings this action against James Humphrey and Robert Ewbank, identified as Dearborn County prosecutors at the time relevant to the complaint, and against Michael Krinoph, an investigator with the Indiana State Police. He alleges that the defendants acted improperly in an investigation culminating in his being charged with killing his wife.

Although it is highly doubtful that the plaintiff's claim contains any merit whatsoever, it is plain that the issue he raises directly implicate the legality of his confinement. The exclusive means by which he may do this in federal court is through an action for habeas corpus relief, which in turn may be brought only after available

state remedies have been exhausted. *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973); *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986); *Taylor v. Kavanagh*, 640 F.2d 450, 451 (2nd Cir. 1981); *Waste Management of Wisconsin, Inc. v. Fokakis*, 614 F.2d 138, 142 (7th Cir. 1980); *Hanson v. Circuit Court of the First Judicial Circuit of Illinois*, 591 F.2d 404 (7th Cir.), *cert. denied* 444 U.S. 907 (1979).

The Supreme Court has criticized "the continued illogic of treating federal habeas and § 1983 actions as fungible remedies for constitutional violations." *Allen v. McCurry*, 449 U.S. 90, 105n.24 (1980). Recent decisions from our Court of Appeals indicate that in some circumstances a court should refrain from entertaining a civil rights action where a decision on the merits of the claim presented would be tantamount to determining the legality of a plaintiff's confinement until such plaintiff has fully exhausted his state remedies challenging such confinement. *Crump v. Lane*, 807 F.2d 1394 (7th Cir. 1986); *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986). That is the situation here, and for the present the broad, general terms of section 1983 must yield to the exclusiveness of the remedy of habeas corpus in federal court. *Hanson v. Heckel*, 791 F.2d 93 (7th Cir. 1986).[1] Accordingly, the plaintiff's request to proceed *in forma pauperis* must be denied and the action dismissed without prejudice.

IT IS SO ORDERED this 1st day of February 1989.

/s/ James E. Noland
JAMES E. NOLAND, Judge
United States District Court

[1] Because the plaintiff has not alleged and the Court could not establish that he has completed the appellate process in Indiana, construing the present complaint as a habeas corpus petition would also result in dismissal without prejudice for failure to satisfy the exhaustion requirement of the federal habeas statute.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

(Title Omitted in Printing)

JUDGMENT

This cause is before the Court on the complaint of Roy Heck and on his Application to Proceed *in Forma Pauperis*.

Whereupon the Court, having read and examined such Application and complaint, and having this day made its Entry,

IT IS NOW ORDERED, ADJUDGED AND DECREED that the plaintiff's Application to Proceed *in Forma Pauperis* is DENIED, that the plaintiff take nothing by his complaint and this cause of action is DISMISSED WITHOUT PREJUDICE.

/s/ James E. Noland
JAMES E. NOLAND, Judge
United States District Court

Date: Feb. 1, 1989

SUPREME COURT OF INDIANA

No. 15S00-8711-CR-1081

ROY HECK, SR.,
Appellant,
v.
STATE OF INDIANA,
Appellee.

April 6, 1990

GIVAN, Justice.

A jury trial resulted in the conviction of appellant of Voluntary Manslaughter, for which he received a sentence of fifteen (15) years.

The facts are: The appellant, Roy Heck, Sr., and the decedent, Rickie Heck, were husband and wife. In August of 1985, Rickie started dissolution proceedings against appellant. Sometime between January 5 and 6, 1986, while the dissolution proceedings were pending, the decedent disappeared.

In late October of 1986, her decomposed remains were found buried on appellant's farm. Dr. Lee Lehman, a pathologist, testified that he performed an autopsy on the remains of the decedent in October of 1986, but because of the advanced decomposition of the remains, he found no demonstrative cause of death. However, after further consideration, the pathologist's report was changed, and because of a broken jaw, which he believed had been inflicted near the time of death, he theorized the probability was that the decedent had died as a result of a severe blow to the head.

Near midnight on January 6, 1986, a number of witnesses in the vicinity of the trailer in which the decedent lived heard an argument between the decedent and another person. Some of these people did not see the other person, while others stated that they saw the decedent arguing with a tall young man. One of these witnesses, Tessie Standriff, stated that her trailer was near the decedent's trailer and that she heard the argument and could identify appellant as the person arguing with the decedent. She stated that she could not identify him by his face but could identify him by his voice.

At trial, she testified that appellant told the victim she was coming home because she was his wife. However, during a pretrial deposition, she had indicated she had not heard such a statement. The evidence shows that Mrs. Standriff was Philippine and had a limited use and understanding of the English language.

Some of the witnesses testified they heard screaming and gunshots that night. Following the decedent's disappearance, appellant told various relatives that she had told him she was taking a trip to Florida. When Roy Heck, Jr. went with appellant to the decedent's trailer, he noticed food still on the stove. He also noticed the trailer was messed up, which was unusual for his mother. The following day, Junior observed one of his mother's suitcases in appellant's home.

A few weeks before the victim's disappearance, appellant had beaten her and was scheduled to go to trial on charges stemming from that incident the week the victim disappeared. When he failed to appear in court, he was arrested. While in jail, he was visited by his daughter, Roberta, and his girlfriend, Shirley Slaughter. He asked them to sprinkle pepper over the site of a sinkhole on his farm (this is the location where the body eventually was found). He also asked them to remove the victim's possessions from his home, including spare purses and a

suitcase, before the police searched the house. The women complied with the request the next day. The suitcase contained items of female apparel. The purse contained the victim's drivers license, social security card, make-up, and other such items.

Appellant also requested that the two women telephone the police pretending to be the victim. Shirley attempted to comply with appellant's request. Appellant later told Roberta to keep quiet about her mother's purse and drivers license.

Robert Cuneo testified that he and his father were in the roof repair business and that in times past appellant had permitted them to dump old shingles on his farm. Shortly after the victim's disappearance, appellant contacted the elder Cuneo and asked him to dump some old shingles in the area where the victim's body later was found. He told Cuneo that he wanted the shingles dumped there to cover up the smell of some soured corn. Robert Cuneo testified that the area appeared to have been recently dug out and smoothed over.

In March of 1986, Roberta was in Florida with Eleanor Slaughter, Shirley's mother-in-law, and Shirley's daughter, Shawn Theis. She observed that Eleanor had the victim's ring in her possession with other jewelry to be sold. Eleanor told her that appellant had given her the ring to sell. Appellant later claimed that he had obtained the ring when the victim threw it at him during an argument.

In October of 1986, appellant was served with a warrant to search his farm and in particular the sinkhole site where the victim's remains later were found. Shortly after the warrant was served, appellant left and went to Tennessee. However, he returned shortly and turned himself in to the police.

Appellant claims the evidence is insufficient to support his conviction and couples this with his claim that much

of the evidence submitted was inadmissible. Appellant contends the State's evidence fails to disclose the cause, means, manner, place, or time of the victim's death. It is true that none of these facts was established by direct evidence. However, a jury's verdict may be based solely upon circumstantial evidence. *Rowan v. State* (1982), Ind., 431 N.E.2d 805.

In the case at bar, there is ample evidence to support a finding that appellant had a history of battering his wife, including a criminal charge for which he was to go on trial near the time of her disappearance. There also was evidence that at the time of the victim's disappearance, appellant had stated falsely to others that his wife had gone on a trip. He also removed luggage and personal items from her trailer to his home, then instructed his girlfriend and his daughter to remove those items before police came to the house.

Further, appellant's conviction is supported by the fact that the victim's remains were found buried on appellant's farm, that he caused others to dump old shingles on the site of her burial, and that when police obtained a search warrant to search his farm he left the state. His flight was relevant although appellant did return to Indiana of his own volition and turn himself in to the police. The jury also was entitled to believe that a man fitting appellant's general description was heard engaged in a heated argument with the decedent at her trailer on the evening she disappeared.

Appellant claims the State failed to prove by any credible evidence the cause of the decedent's death. It is true that when the remains were first examined by the pathologist, he stated that due to the state of decomposition he could not state a cause of death. However, upon further consideration, he observed that the presence of a broken jaw, which had occurred at approximately the time of death, could indicate a blow to the head which might have been severe enough to have caused death.

This Court has held that the cause of death may be established by circumstantial evidence. *Patterson v. State* (1988), Ind., 532 N.E.2d 604. There is ample circumstantial evidence in this case to support the jury's determination that the victim had met a violent death at the hands of appellant.

Appellant attacks the testimony of State's witness Tessie Standriff, whose trailer was situated near the trailer of the victim. She testified that on the night of the victim's disappearance, she heard the victim having a heated argument with a tall man. She was unable to identify his face, but she said she recognized his voice as appellant's.

Appellant points out that during the investigation Standriff came to the police department and asked to hear the voice of appellant on a tape recorder. The police complied with her wish. She verified that the voice was the same voice she had heard on the night of the victim's disappearance. Appellant contends that this constituted an impermissibly suggestive identification of appellant's voice in that Standriff knew she was listening to the voice of appellant at the time she made the identification.

It is true that this Court has held that it is improperly suggestive for police to inform a lineup observer that the suspect is in the lineup. *Chambers v. State* (1981), Ind., 422 N.E.2d 1198; *Young v. State* (1979), 272 Ind. 1, 395 N.E.2d 772. However, this was not a lineup or voice identification instituted by the police officers.

Standriff suspected that the person she had seen and heard was the husband of the victim, and she came to police headquarters knowing that they had tape recordings of appellant's voice and she wanted to assure herhelf that she was correct in believing the person she had heard was in fact appellant. This certainly does not fall within the framework of a police-engineered lineup or voice identification.

Rather than a thing to be condemned, Standriff's action was a proper and conscientious thing to be condoned. She merely was striving to make sure she had not made an error in the voice identification. We see nothing in this episode to taint her in-court identification of appellant's voice and her statement that the voice was the same voice she had heard on the night of the victim's disappearance.

Appellant also contends that Mrs. Standriff's testimony should not be believed because during the early stages of the investigation she had stated that she had not heard the man state that the victim should come home with him because she was his wife. However, at trial she testified that such was the conversation she heard. This inconsistency was fully disclosed to the jury. It also was disclosed that Mrs. Standriff was from the Philippines and that she had a very limited understanding and use of the English language. The jury was entitled to determine whether this fact contributed to the apparent inconsistencies in Standriff's statements. *Bane v. State* (1981), Ind., 424 N.E.2d 1000.

Appellant claims the judgment is contrary to law due to the highly prejudicial and irrelevant hearsay testimony of certain of the State's witnesses. Twelve different witnesses testified concerning various incidents in which the decedent had displayed bruises and informed other persons that she had been beaten by appellant. In situations such as the case at bar, where the victim on several previous occasions has exhibited physical injuries and has notified observers that the injuries were inflicted by the defendant, such testimony, although hearsay, is admissible to show the defendant's state of mind at the time of those attacks and to demonstrate his motive and the likelihood that he was the perpetrator of the fatal attack upon the decedent. *Drummond v. State* (1984), Ind., 467 N.E.2d 742, citing *Romine v. State* (1983), Ind., 455 N.E.2d 911 and *Moore v. State* (1981), 275 Ind. 39, 414 N.E.2d 558.

Appellant attempts to distinguish this line of cases, stating that although he and the decedent had an ongoing relationship, there was no evidence that the deceased died in a manner similar to any of the prior assaults. Thus, he argues, the testimony in addition to being hearsay was irrelevant. We cannot agree with appellant in his evaluation of this evidence. The prior injuries to the victim were claimed by her to be the result of physical beatings from appellant. The evidence in this case, although wholly circumstantial, was that there was a high probability the victim died from a beating of such severe intensity that a broken jaw resulted. Rather than distinguishing the line of cases above cited, such evidence brings the case squarely within the rationale of those cases.

We see no error in the admission of the evidence of prior beatings suffered by the victim at the hands of the appellant.

Appellant claims the trial court erred when it allowed Robert Cuneo to testify what his father, Harry Cuneo, had told him regarding appellant's request that they dump shingles at a designated place on his farm. However, this comes under the *Patterson* exception to the hearsay rule that when the declarant is in court and testifies, his prior out-of-court statements may be put in evidence. *Patterson v. State* (1975), 263 Ind. 55, 324 N.E.2d 482. Appellant makes the same complaint against the testimony of Mary Cuneo. Her testimony was admissible for the same reason. *Id.*

Appellant also contends it was error to admit the testimony of Detective Michael Kreinhop concerning a telephone conversation he had with Donna Brady as to whether the victim had made a trip to Florida at the time of her disappearance. This testimony, however, was not placed in evidence for the purpose of the truth of whether the victim had gone to Florida but for the purpose of showing why the officer's investigation took the turn it

did. The evidence was admissible to show the reason for the officer's subsequent action. *Altmeyer v. State* (1988), Ind., 519 N.E.2d 138; *Boyd v. State* (1986), Ind., 494 N.E.2d 284, *cert. denied,* 479 U.S. 1046, 107 S.Ct. 910, 93 L.Ed.2d 860; *Stout v. State* (1985), Ind., 479 N.E. 2d 563.

Appellant claims even if this Court would hold that the testimony of the various individuals was admissible, the sheer number of witnesses who testified to extrajudicial statements rendered them so prejudicial as to require reversal. However, this Court has held that where individual items of evidence do not constitute reversible error, we will not reverse based upon the cumulative effect of that evidence. *See Stonebraker v. State* (1987), Ind., 505 N.E.2d 55; *Hudson v. State* (1986), Ind., 496 N.E.2d 1286. We see no reversible error in the admission of the above evidence.

Appellant contends the trial court erred in allowing the rebuttal testimony of Roberta Heck. On rebuttal, she testified that she had reported to appellant that she had been raped but that he told her not to report it—that he would "get him (rapist) in his own time." He further stated to her that he was "going to break his (rapist) legs or something." Appellant claims this irrelevant testimony was highly prejudicial to his case. The scope of rebuttal evidence is within the trial court's discretion. *Stewart v. State* (1988), Ind., 531 N.E.2d 1146. Evidence which explains, contradicts, or disproves the adversary's evidence may be competent rebuttal evidence. *Buchanan v. State* (1975), 263 Ind. 360, 332 N.E.2d 213.

In the case at bar, appellant attempted to intimate that someone else, such as his daughter Roberta, had been responsible for the death of the decedent. In pursuing this claim, he presented evidence attempting to show that the relationship between the decedent and Roberta had been turbulent. In his direct testimony, he claimed that

Roberta had been involved in an argument and a fight with a man named Luther Thompson, who, he claimed Roberta said, had raped her. He further stated that he had told Roberta to go to the police but that his wife had told her it was her own fault.

In raising such an issue, appellant opened the door for Roberta's rebuttal testimony to state her version of what had happened when she reported the rape to her parents. We see no error in the admission of Roberta's rebuttal testimony.

Appellant claims the court abused its discretion when, upon learning that the order for separation of witnesses had been violated, it allowed testimony from witnesses who had violated the separation order. Where there has been a violation of a separation order, the trial court, in the absence of connivance or collusion by the party calling the witness, may permit the witness to testify. *Cox v. State* (1981), 275 Ind. 636, 419 N.E.2d 737; *O'Conner v. State* (1980), 272 Ind. 460, 399 N.E.2d 364. The trial court's decision on such a matter will not be reversed absent an abuse of discretion. *Buchanan, supra.*

In the case at bar, appellant makes no claim that the prosecutor in any way connived to have the witnesses violate the separation order. In fact, the prosecutor observed that it was not known that these witnesses, after their initial testimony, would be recalled to the stand and that he only learned of such a necessity after appellant had presented unanticipated evidence which required the rebuttal testimony of the witness who had violated the order following their initial testimony. Under the circumstances, we see no reversible error in permitting these witnesses to testify.

Appellant contends the trial court erred in admitting State's Exhibits Nos. 2, 3, 101, and 105. Appellant acknowledges that the trial court has broad discretion in ruling on the admissibility of evidence and will be reversed only for a clear abuse of discretion. *Jackson v. State* (1986), Ind., 490 N.E.2d 1115. However, he claims that in the case at bar the questioned evidence was inadmissible because its prejudicial impact outweighed its probative value, citing *Rust v. Guinn* (1981), Ind.App., 429 N.E.2d 299. Exhibits 2 and 3 were taped interviews of appellant by the police. Neither tape included a confession. Appellant claims they thus were inadmissible because they were simply hearsay statements made by appellant and neither tape had any logical tendency to prove a material fact.

First, the State correctly observes that there is no hearsay problem in this issue because appellant testified at trial and was subject to examination on the evidence. *See Washburn v. State* (1986), Ind., 499 N.E.2d 264. As to the relevancy of his statements, appellant had filed an alibi notice in which he claimed to have been at the home of his son at the time the murder was believed to have taken place. The statements appellant made in these interviews concerned his whereabouts on the night of the homicide. Evidence is relevant if it tends to prove or disprove any material fact. *See Mengon v. State* (1987), Ind., 505 N.E.2d 788. Under the circumstances, we see no error in admitting State's Exhibits Nos. 2 and 3 into evidence.

State's Exhibit No. 101 is a certified copy of a petition for dissolution of the marriage between appellant and the victim. Appellant claims the State introduced the petition for the sole purpose of having the jury see that a restraining order against him was issued from the divorce court. He claims that such evidence is clearly inadmissible because its prejudicial impact outweighs its probative value, citing *Rust, supra.* Appellant claims, without citing authority, that to place before the jury the fact that a restraining order had been issued is improper. However, in the case at bar, there was an abundance of other evidence of prior abuse of appellant against the victim.

Even if we would assume *arguendo* that appellant's contention is correct and that a restraining order should not be placed before the jury, in the case at bar such evidence was merely cumulative and to only a minuscule degree. The evidence of the victim's prior abuse was overwhelming and the addition of the fact that a divorce court had issued a restraining order hardly could be expected to have any significant impact upon the decision of the jury. We see no reversible error in the admission of State's Exhibit No. 101.

State's Exhibit No. 105 is a request for an initial hearing stating that appellant was arrested on a bench warrant on a battery charge which was not the subject matter of the case at bar. Again, there was admissible independent evidence that appellant was to come to trial on a charge of assaulting the victim and that he was to appear in court shortly after the time the victim disappeared. The fact that State's Exhibit 105 concerned that charge was merely repetitious of what the jury already had before it.

During cross-examination of Detective Kreinhop, appellant questioned him as to how many charges had been filed and questioned the delay in filing the charges. The State's presentation of its Exhibit 105 was a response by the prosecutor to explain the delay in filing the instant charge. It was entirely proper for the State to present evidence to explain the questions raised by the cross-examination of Detective Kreinhop. *Starks v. State* (1987), Ind., 517 N.E.2d 46; *Kalady v. State* (1984), Ind., 462 N.E.2d 1299. We see no reversible error in the admission of State's Exhibit No. 105.

Appellant contends the trial court erred when it allowed the testimony of Officer Kreinhop regarding a telephone conversation and his actions after he heard the conversation. The officer testified to overhearing a conversation between appellant and his girlfriend, Shirley Slaughter. Appellant is apparently arguing that eavesdropping upon his conversation violated his Fourth Amendment rights and that any evidence and investigation resulting from the overhearing of the conversation should be suppressed.

At trial, however, appellant's objection was not based upon this Fourth Amendment claim. His objection at trial was that there was a discovery violation, both because he had not been apprised of any statement of his own made in the telephone conversation and because any statement by Shirley Slaughter was hearsay. We further would observe that the trial court sustained appellant's objection to the content of the conversation overheard by Detective Kreinhop. Testimony as to what the officer did after he heard the telephone conversation has been held to be proper evidence. *See Hester v. State* (1987), Ind., 512 N.E.2d 1110; *Boyd, supra.* We see no reversible error in permitting the officer to testify as to what avenue of investigation he pursued after hearing the telephone conversation.

The trial court is affirmed.

SHEPARD, C.J. and PIVARNIK, J., concur.

DEBRULER, J., dissents with separate opinion.

DICKSON, J., concurs in result without separate opinion.

DEBRULER, Justice, dissenting.

The same safeguards should be employed by the police forces in voice identification procedures as are employed in seeking visual or photographic identifications. *Matthews v. State* (1988), Ind., 518 N.E.2d 807. The admissibility of the products of such procedures is to be determined upon application of a two-pronged test, the first prong of which is the determination from a totality of the circumstances of whether the procedures are unduly and unnecessarily suggestive, and the second prong of which is whether, if so unduly and unnecessarily sug-

gestive, there was created a substantial likelihood of irreparable misidentification. *Norris v. State* (1976), 265 Ind. 508, 356 N.E.2d 204. If a process fails the test and produces a tainted out-of-court identification by a witness, such witness may nevertheless make an in-court identification if that in-court identification does not depend upon the pre-trial one, but has an independent origin. *Id.*

Here, there is no evidence that the witness Standriff was previously acquainted with appellant's voice or that of the unidentified assailant before the night of the victim's disappearance. Her identification was very uncertain up to the point in time, one week before the trial, when she visited the police station. The voice which she did hear uttered only a few words. American English was not the mother tongue of the witness. She was from the Philippines. She was not a victim, with attention fixed upon one who was attacking her, but simply a neighbor overhearing a neighborhood brouhaha. When, therefore, she came to the police station and asked to hear the suspect's recorded voice, and the police had such a recording, they were under a duty, the same as if the idea had been theirs, to present her with a fair voice identification array or lineup. *Matthews*, 518 N.E.2d 807. Under the totality of these circumstances, their failure to employ such a fair procedure created a very substantial likelihood of irreparable misidentification. The same set of circumstances indicate that there was no independent origin for her in-trial identification from a similar tape of appellant's voice. It was therefore constitutionally inadmissible. I would reverse and remand for a new trial at which such identification testimony would be excluded.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Docket No. S90-00305

Name Roy Heck, Sr., Prisoner No. 874376
Place of Confinement

Westville Correctional Center
P.O. Box 473/Dorm P-2
Westville, Indiana 46391-0473

ROY HECK, SR.
Petitioner

v.

THOMAS D. RICHARDS,
Respondent

The Attorney General of the State of: Indiana—Linley E. Pearson

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

[Filed Jun. 19, 1990]

1. Name and location of court which entered the judgment of conviction under attack Dearborn Circuit Court, Lawrenceburg, Indiana
2. Date of judgment of conviction July 30th, 1987
3. Length of sentence Fifteen (15) Years
4. Nature of offense involved (all counts) Murder-found guilty of Voluntary Manslaughter

5. What was your plea? (Check one)

   (a) Not guilty ☒

   (b) Guilty ☐

   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

   _____

   _____

6. Kind of trial: (Check one)

   (a) Jury ☒

   (b) Judge only ☐

7. Did you testify at the trial?

   Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?

   Yes ☒ No ☐

9. If you did appeal, answer the following:

   (a) Name of court Indiana Supreme Court

   (b) Result Affirmed

   (c) Date of result April 6th, 1990

   (d) Grounds raised 1. Insufficient Evidence,) 2. Conviction was contrary to law in a pre-trial voice identification being inpermissability suggestive.) 3. Judgment was contrary to law due to prejudicial irrelevant hearsay testimony of State's witnesses.) 4. The court erred in allowing rebuttal testimony of Roberta Heck.) 5. The court abused its discretion in allowing testimony of state's rebuttal witnesses after being on notice of the separation order being

violated.) 6. The court erred in admitting State's exhibits 2, 3, 101 and 105.) 7. The court erred in allowing testimony of officer Kreinhop regarding his actions after over hearing a telephone conversation of the defendant.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

    Yes ☐ No ☒

11. If your answer to 10 was "yes," give the following information:

    (a) (1) Name of court N/A

    (2) Nature of proceeding N/A

    (3) Grounds raised N/A

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes ☐ No ☐

    (5) Result N/A

    (6) Date of result N/A

    (b) As to any second petition, application or motion give the same information:

    (1) Name of court N/A

    (2) Nature of proceeding N/A

    (3) Grounds raised N/A

    (4) Did you receive an evidentiary hearing on your petition, application or motion? N/A

    Yes ☐ No ☐

    (5) Result

(6) Date of result N/A

(c) As to any third petition, application or motion, give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result N/A

(6) Date of result N/A

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Conviction was obtained without evidence sufficient to support a verdict of Voluntary Manslaughter.

Supporting FACTS (tell your story *briefly* without citing cases or law): The evidence presented failed to establish petitioner inflicted any injury which may have caused the decedent's death or any action which could be considered as a deliberate intent to do so: Further, the cause of death was not established; the petitioner does not feel that a blow hard enough to fracture a jaw would cause death to any person, which would not make this an adequate means of death.

B. Ground two: Conviction was obtained by illegal over suggestive voice identification.

Supporting FACTS (tell your story *briefly* without citing cases or law). State's witness Tessie Standriff, (18) months after the alleged incident, and one (1) week prior to petitioner's trial, requested to hear a tape recording of petitioner's voice; Authorities provided such with the petitioner. During Petitioner's trial Standriff identified his voice on the tape recording, and testified authorities told her it was petitioner's voice prior to her listening to the tape. As reference SEE Attached Exhibit A.

C. Ground three: Petitioner was denied assistance of counsel during the identification stage.

Supporting FACTS (tell your story *briefly* without citing cases or law): Authorities provided

Tessie Standriff with a recording of petitioner's voice, without affording Petitioner's counsel an opportunity to be present and consealing same until the day of trial.

D. Ground four: In abusing it's descretion, the trial court violated petitioner's right to a fair trial.

Supporting FACTS (tell your story *briefly* without citing cases or law): The monumental amount of hearsay testimony was labeled as "state of mind" of either the petitioner or the decedent, all of which acted to prejudice the jury and amounted to a probability that the petitioner is the one who took the decedent's life.

E. Ground Evidence was illegally obtained, used and presented to the jury.

Supporting FACTS (tell your story *briefly* without citing cases or law): Police officer Michael Kreinhop, was allowed to testify in depth concerning his actions after "eavesdropping" on petitioner's telephone call from the Dearborn County Jail, which was suppose to be a private phone. Officer Kreinhops testimony was highly prejudicial to the petitioner before the jury.

F. Ground _____

_____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

_____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court,

state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: It may be presumed arguendo, that Appellate Counsel did not as an issue specifically raise ground C-three. However, the issue is mentioned within the Appellate Brief at (20) argument "B". Petitioner can only cite this as an oversight of his Appellate Counsel.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Joseph Votaw III. 230 West High St. Lawrenceburg, In. 47025 (812-537-4500)

(b) At arraignment and plea "SAME AS ABOVE"

(c) At trial Joseph Votaw III. and John J. Darnette

(d) At sentencing Joseph Votaw III. and John J. Darnette

(e) On appeal Kathleen A. Dayson, 6050 East 10th St. Indianapolis, In. 46219 (317-352-1251)

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: N/A

(b) Give date and length of the above sentence: August 18th, 1987 sentenced to an executed term of fifteen (15) years.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No n/a

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 15, 1990.

/s/ Roy Heck, Sr.
Signature of Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil No. S 90-305

ROY HECK, SR.,
Petitioner

v.

THOMAS D. RICHARDS; and
INDIANA ATTORNEY GENERAL
Respondents

MEMORANDUM AND ORDER

[Filed Jan. 7, 1991]

On June 19, 1990, *pro se* petitioner, Roy Heck, Sr., an inmate at the Westville Correctional Center, filed a petition seeking relief under 28 U.S.C. § 2254. The return and motion to dismiss filed by the respondents on November 19, 1990, demonstrates the necessary compliance with *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982).

The petitioner was convicted in the Dearborn Circuit Court in Lawrenceburg, Indiana, of the crime of voluntary manslaughter. He was sentenced to 15 years in prison. His sentence was affirmed on direct appeal to the Supreme Court of Indiana, as reflected in *Heck v. State*, 552 N.E.2d 446 (Ind. 1990).

Here, he raises four grounds for this petition under 28 U.S.C. § 2254, as follows:

(1) conviction obtained without evidence sufficient to support a verdict of voluntary manslaughter;

(2) conviction obtained by illegal, over suggestive voice identification;

(3) petitioner denied assistance of counsel during the identification stage.

(4) trial court abused its discretion and violated petitioner's right to a fair trial.

Three of the above issues were presented on direct appeal to the Supreme Court of Indiana. The issue regarding denial of assistance of counsel was not so presented. It is basic and elementary under *Rose v. Lundy*, 455 U.S. 509 (1982), *Duckworth v. Serrano*, 454 U.S. 1 (1981), and *Varnell v. Young*, 839 F.2d 1245 (7th Cir. 1988), that as a prerequisite to seeking relief under § 2254, available state remedies must be exhausted. Recently, Justice Scalia, speaking for the Supreme Court of the United States in *Castille v. Peoples*, 489 U.S. 346 (1989), reaffirmed the same in no uncertain terms. Most recently, *see also Cruz v. Warden of Dwight Correctional Center*, 907 F.2d 665 (7th Cir. 1990).

Since there are readily available remedies being pursued, they must be exhausted. Therefore, this petition is now DISMISSED WITHOUT PREJUDICE. IT IS SO ORDERED.

DATED: January 7, 1991

/s/ Allen (Illegible)
Chief Judge
Northern District of Indiana

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Case Number: S 90-305

ROY HECK, SR.,
Petitioner

v.

THOMAS D. RICHARDS; and
INDIANA ATTORNEY GENERAL

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

☐ IT IS ORDERED AND ADJUDGED that this petition is now dismissed without prejudice since there are readily available remedies being pursued.

Date January 7, 1990

RICHARD E. TIMMONS
Clerk

/s/ [Illegible]
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Name Roy Heck, Sr., Prisoner No. 874376
Place of Confinement

Westville Correctional Center
P.O. Box 473/dorm O-1
Westville, Indiana 46391-0473

ROY HECK, SR.,
Petitioner

v.

THOMAS D. RICHARDS,
Respondent

Attorney General of the State of: Indiana—Linley E. Pearson

PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

[Filed Jan. 22, 1991]

1. Name and location of court which entered the judgment of conviction under attack Dearborn Circuit Court, Lawrenceburg, Indiana
2. Date of judgment of conviction July 30th, 1987
3. Length of sentence Fifteen Years
4. Nature of offense involved (all counts) Murder—found guilty of Voluntary Manslaughter

5. What was your plea? (Check one)

   (a) Not guilty ☒

   (b) Guilty ☐

   (c) Nolo contendere ☐

   If you entered a guilty plea to one count of indictment, and a not guilty plea to another count of indictment, give details: N/A

6. Kind of trial: (Check one)

   (a) Jury ☒

   (b) Judge only ☐

7. Did you testify at the trial?

   Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?

   Yes ☒ No ☐

9. If you did appeal, answer the following:

   (a) Name of court Indiana Supreme Court

   (b) Result Affirmed

   (c) Date of result April 6th, 1990

   (d) Grounds raised 1. Insufficient evidence) 2. Conviction was contrary to law in pre-trial voice identification being impermissability suggestive. 3. Judgment was contrary to law due to prejudicial irrevelent hearsay testimony of state's witnesses.) 4. The court errored in allowing rebuttal testimony of Roberta Heck.) 5. The court abused its descretion in allowing testimony of states rebuttal witnesses after being on notice of the separation order being violated.) 6. The court errored in allowing testimony of officer Kreinhop regarding his ac-

tions after over hearing a telephone conversation of the defendant.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

    Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

    (a) (1) Name of court Northern District Court under cause S90-305

    (2) Nature of proceeding Petition for writ of habeas corpus 28 U.S.C. 2254

    (3) Grounds raised same as listed herein with the exception of ground (3) which was removed due to being unexhausted

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes ☐ No ☒

    (5) Result Dismissed without prejudice

    (6) Date of result January 7th, 1991

    (b) As to any second petition, application or motion give the same information:

    (1) Name of court N/A

    (2) Nature of proceeding N/A

    (3) Grounds raised N/A

    (4) Did you receive an evidentiary hearing on your petition, application or motion?

    Yes ☐ No ☐

    (5) Result N/A

(6) Date of result N/A

(c) As to any third petition, application or motion, give the same information:

(1) Name of court N/A

(2) Nature of proceeding N/A

(3) Grounds raised N/A

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes ☐ No ☐

(5) Result N/A

(6) Date of result N/A

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☐ No ☐

(2) Second petition, etc. Yes ☐ No ☐

(3) Third petition, etc. Yes ☐ No ☐

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting such ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail

to set forth all grounds in this petition you will be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Conviction was obtained without evidence sufficient to support a conviction of Voluntary Manslaughter.

Supporting FACTS (tell your story *briefly* without citing cases or law): The evidence presented failed to establish petitioner inflicted any injury which may have caused the decedent's death or any action which could be considered as a deliberit intent to do so: Further, the cause of death was not established; The petitioner does not feel that a blow hard enough to fracture a jaw would cause death to any person, which would not make this an adequate cause of death.

B. Ground two: Conviction was obtained by illegal over suggestive voice identification.

Supporting FACTS (tell your story *briefly* without citing cases or law): State's witness, Tessie Standriff, (18) months after the alleged incident, and one (1) week prior to petitioner's trial, requested to hear a tape recording of petitioner's voice; Authorities provided such with the petitioner. During petitioner's trial Standriff identified his voice on a tape recording, and testified that authorities told her it was the petitioner's voice prior to her listening to the tape. As reference, see attached exhibit A.

C. Ground three: In abusing its discretion, the trial court violated petitioner's right to a fair trial.

Supporting FACTS (tell your story *briefly* without citing cases or law): The monumental amount of hearsay testimony was labled as "state of mind" of either the petitioner or the decedent, all of which acted to prejudice the jury and amounted to a probability that the petitioner is the one who took the decedent's life.

D. Ground four: Evidence was illegally obtained, used and presented to the jury.

Supporting FACTS (tell your story *briefly* without citing cases or law): Police officer Michael Kreinhop, was allowed to testify in depth concerning his actions after "eavesdropping" on petitioner's telephone call from the Dearborn County Jail, which was suppose to be a private phone. This testimony was highly prejudicial to the petitioner before the jury.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?

Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Joseph Votaw III. 230 West High St. Lawrenceburg, In. 47205 (812) 537-4500

(b) At arraignment and plea "same as above"

(c) At trial Joseph Votaw III. and John Darnette

(d) At sentencing Joseph Votaw III. and John Darnette

(e) On appeal Kathleen A. Dayson 6050 East 10th St. Indianapolis, In. 46219 (317) 352-1251

(f) In any post-conviction proceeding N/A

(g) On appeal from any adverse ruling in a post-conviction proceeding N/A

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☐ No ☒

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future:

N/A

(b) Give date and length of the above sentence: August 18th, 1987 sentenced to an executed term of fifteen (15) years.

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☒

Wherefore, petitioners pray that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on Jan. 14, 1991.

/s/ Roy Heck, Sr.
Signature of Petitioner

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil No. S 91-40

ROY HECK, SR.,
Petitioner

v.

THOMAS RICHARDS and INDIANA ATTORNEY GENERAL,
Respondents

MEMORANDUM AND ORDER

[Filed July 31, 1991]

On January 30, 1991, *pre se* petitioner, Roy Heck Sr., an inmate at the Westville Correctional Center, filed a petition seeking relief under 28 U.S.C. § 2254. The return filed by the respondents on April 30, 1991, demonstrates the necessary compliance with *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir. 1982). The state court record has been filed and examined pursuant to the mandates of *Townsend v. Sain*, 372 U.S. 293 (1963). The petitioner has filed an elaborate, 25-page Traverse on June 5, 1991, which has been examined.

The petitioner was convicted in the Dearborn Circuit Court of the offense of voluntary manslaughter. He was sentenced to a 15-year term of imprisonment. A direct appeal was taken to the Supreme Court of Indiana which affirmed the aforesaid conviction in a majority opinion authored by Justice Givan and reported as *Heck v. State*, 552 N.E.2d 446 (Ind. 1990). Justice DeBruler dissented with opinion and Justice Dickson dissented without opinion.

An earlier petition for relief under 28 U.S.C. § 2254 was filed in this court on June 19, 1990, under cause number S90-305, and this court entered a Memorandum on January 7, 1991, dismissing the petition without prejudice, due to the failure to exhaust an issue in the state courts.

Here, this petitioner presents the same issues for review that were presented in S90-305, except he has deleted the issue of denial of effective assistance of counsel. Here, the explicit issues raised are:

> (1) whether this conviction was supported by sufficient evidence;
>
> (2) whether the in-court identification of petitioner's voice by witness Tessie Standriff was tainted by an unduly and unnecessarily suggestive out-of-court identification;
>
> (3) whether the state trial court violated the petitioner's right to a fair trial by allowing in alleged hearsay testimony; and
>
> (4) whether allowing Officer Michael Kreinhop to testify concerning his actions after eavesdropping on a telephone conversation with Heck constituted the admission of illegally-obtained evidence.

The Indiana statute under which this petitioner was charged and convicted was Indiana Code § 35-42-1-3, which provides in part:

> (a) a person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter, a Class B felony.
>
> (b) The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder under section 1(1) [35-42-1-1-(1)] of this chapter to voluntary manslaughter.

The relevant facts with reference to this offense are stated by Justice Givan, as follows:

> The appellant, Roy Heck, Sr., and the decedent, Rickie Heck, were husband and wife. In August of 1985, Rickie started dissolution proceedings against appellant. Sometime between January 5 and 6, 1986, while the dissolution proceedings were pending, the decedent disappeared.
>
> In late October of 1986, her decomposed remains were found buried on appellant's farm. Dr. Lee Lehman, a pathologist, testified that he performed an autopsy on the remains of the decedent in October of 1986, but because of the advanced decomposition of the remains, he found no demonstrative cause of death. However, after further consideration, the pathologist's report was changed, and because of a broken jaw, which he believed had been inflicted near the time of death, he theorized the probability was that the decedent had died as a result of a severe blow to the head.
>
> Near midnight on January 6, 1986, a number of witnesses in the vicinity of the trailer in which the decedent lived heard an argument between the decedent and another person. Some of these people did not see the other person, while others stated that they saw the decedent arguing with a tall young man. One of these witnesses, Tessie Standriff, stated that her trailer was near the decedent's trailer and that she heard the argument and could identify appellant as the person arguing with the decedent. She stated that she could not identify him by his face, but could identify him by his voice.
>
> At trial, she testified that appellant told the victim she was coming home because she was his wife. However, during a pretrial deposition, she had indicated she had not heard such a statement. The evidence shows that Mrs. Standriff was Philippine and

had a limited use and understanding of the English language.

Some of the witnesses testified they heard screaming and gunshots that night. Following the decedent's disappearance, appellant told various relatives that she had told him she was taking a trip to Florida. When Roy Heck, Jr. went with appellant to the decedent's trailer, he noted food still on the stove. He also noticed the trailer was messed up, which was unusual for his mother. The following day, Junior observed one of his mother's suitcases in appellant's home.

A few weeks before the victim's disappearance, appellant had beaten her and was scheduled to go on trial on charges stemming from that incident the week the victim disappeared. When he failed to appear in court, he was arrested. While in jail, he was visited by his daughter, Roberta, and his girlfriend, Shirley Slaughter. He asked them to sprinkle pepper over the site of a sinkhole on his farm (this is the location where the body eventually was found). He also asked them to remove the victim's possessions from his home, including spare purses and a suitcase, before the police searched the house. The women complied with the request the next day. The suitcase contained items of female apparel. The purpose contained the victim's drivers license, social security card, make-up and other such items.

Appellant also requested that the two women telephone the police pretending to be the victim. Shirley attempted to comply with appellant's request. Appellant later told Roberta to keep quite about her mother's purse and drivers license.

Robert Cuneo testified that he and his father were in the roof repair business and that in times past appellant had permitted them to dump old shingles on his farm. Shortly after the victim's disappear-

ance, appellant contacted the elder Cuneo and asked him to dump some old shingles in the area where the victim's body later was found. He told Cuneo that he wanted the shingles dumped there to cover up the smell of some soured corn. Robert Cuneo testified that the area appeared to have been recently dug out and smoothed over.

In March of 1986, Roberta was in Florida with Eleanor Slaughter, Shirley's mother-in-law, and Shirley's daughter, Shawn Theis. She observed that Eleanor had the victim's ring in her possession with other jewelry to be sold. Eleanor told her that appellant had given her the ring to sell. Appellant later claimed that he had obtained the ring when the victim threw it at him during an argument.

In October of 1986, appellant was served with a warrant to search his farm and in particular the sinkhole site where the victim's remains later were found. Shortly after the warrant was served, appellant left and went to Tennessee. However, he returned shortly and turned himself in to police.

Heck, 552 N.E.2d at 448-449.

Justice Stewart, speaking for the Supreme Court of the United States in *Jackson v. Virginia*, 443 U.S. 307 (1979), stated:

> A judgment by a state appellate court rejecting a challenge to evidentiary sufficiency is of course entitled to deference by the federal courts, as in any judgment affirming a criminal conviction. But Congress in § 2254 has selected the federal district courts as precisely the forums that are responsible for determining whether state convictions have been secured in accord with federal contitutional law. The federal habeas corpus statute presumes the norm of a fair trial in the state court and adequate state post-conviction remedies to redress possible error. See 28

> U.S.C. § 2254(b), (d). What it does not presume is that these state proceedings will always be without error in the constitutional sense. The duty of a federal habeas corpus court to appraise a claim that constitutional error did occur—reflecting as it does the belief that the "finality" of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right—is not one that can be so lightly abjured.

Id. at 323. The Supreme Court in *Jackson* held:

> We hold that in a challenge to a conviction brought under 28 U.S.C. § 2254—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof beyond a reasonable doubt.

Id. (footnote omitted). *See also Sumner v. Mata*, 449 U.S. 539 (1981); *Dooley v. Duckworth*, 832 F.2d 445 (7th Cir. 1987), *cert. denied*, 485 U.S. 967 (1988); *United States ex rel. Haywood v. O'Leary*, 827 F.2d 52 (7th Cir. 1987); *Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217 (7th Cir.), *cert. denied*, 484 U.S. 867 (1987); *Shepard v. Lane*, 818 F.2d 615 (7th Cir.), *cert. denied*, 484 U.S. 929 (1987); and *Perri v. Director, Department of Corrections*, 817 F.2d 448 (7th Cir.), *cert. denied*, 484 U.S. 843 (1987).

A review of the record in the light most favorable to the prosecution convinces the court that a rational trier of fact could readily have found the petitioner guilty beyond a reasonable doubt of voluntary manslaughter.

Following *Jackson*, 443 U.S. at 307, there is an increasingly long line of cases in this circuit that suggest that the facts found by the highest court of a state are presumed correct. The most recent statement of that principle is found in *Anderson v. Thieret*, 903 F.2d 526, 531 (7th Cir. 1990).

The next issue presented has to do with identification, an issue that is often troubling. *See United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972). A part of the tension between Justice DeBruler's opinion and the majority opinion of Justice Givan centers on this very issue under state law. Apparently, Justice DeBruler does not challenge the statement of facts that is above quoted.

The historic facts which the majority of the Indiana Supreme Court relied on in regard to identification are included in the statement above quoted from Justice DeBruler's opinion. There is obviously a disagreement between Justices DeBruler and Givan on the interpretation of these facts. This court is frankly hard-pressed to find a constitutional issue in this inter-justice dispute. One cannot tell what Justice Dickson was concerned about. Certainly, this court can presume as correct under 28 U.S.C. § 2254(d) the historic facts involved in this dispute, but in the interest of the greatest of caution and perhaps not specifically mandated by *Miller v. Fenton*, 474 U.S. 104 (1985), this court has taken the trouble to make an independent investigation of the evidence regarding identification. This court is well aware of concerns expressed in *Dudley v. Duckworth*, 854 F.2d 967 (7th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989). More recently, compare *Hunter v. Clark*, No. 89-2594 (7th Cir. June 6, 1991).

In *United States v. Dominguez*, 835 F.2d 694 (7th Cir. 1987), there was a dispute over voice identification. Under *Rodriguez v. Young*, 906 F.2d 1153, 1161 (7th Cir. 1990), *cert. denied*, —— U.S. ——, 111 S.Ct. 698 (1991), there appears to be a judicially imposed recipe to deal with such challenges as to identification testimony. In this regard, *United States v. Telfaire*, 469 F.2d at 552, remains useful reading. However, see *United States v. Anderson*, 739 F.2d 254 (7th Cir. 1984).

This court also understands quite clearly that while the facts found by the highest court in Indiana are presumed to be correct, the court has to decide questions of constitutional law under *Bell v. Duckworth*, 861 F.2d 169 (7th Cir. 1988), *cert. den.* 489 U.S. 1088 (1989), independently. Such has been done here. In *Rodriguez v. Young*, 906 F.2d at 1153 the court set out a two-part test to govern challenges to identification testimony. That court said that a defendant (here petitioner) must first prove that the challenged identification was preceded by unnecessarily suggestive police procedures. Here, the Supreme Court of Indiana, speaking through Justice Givan, opined that the fact that the witness went to the police and requested to hear a tape-recording of petitioner's voice did not fall within a police engineered lineup for voice identification. The witness wanted to be assured that she was correct in believing that the person she heard was the petitioner. The witness, Ms. Standriff, had the benefit of the police playing the tape of petitioner's voice outside of his presence.

It appears that the procedures adopted by the state trial court which focused upon the concept of reliability were adequate to meet the due process standards of the Fourteenth Amendment and any confrontation standards in the Sixth Amendment in regard to this issue. Upon an examination of the record, this court determines that the issue was fairly presented to the trier of fact in this case the jury, and does not fall afoul of any of the aforesaid constitutional mandates.

Even if the identification was preceded by an unnecessarily suggestive police procedure, the due process clause of the Fourteenth Amendment is not per se violated. The key consideration is reliability. In this case, the jury was given a full opportunity to evaluate the credibility of Ms. Standriff's testimony. There was no reversible error in the way that Judge Meyer chose to manage this sensitive problem and there is no constitutional error.

There is a further assertion here and in the Supreme Court of Indiana with regard to the admissibility of hearsay testimony. The Supreme Court of Indiana, speaking through Justice Givan, rejected that concept at page 451 of the opinion. A petitioner under § 2254 is hard-pressed to make a constitutional claim out of an evidentiary ruling. *See Haas v. Abrahamson*, 910 F.2d 384, 389 (7th Cir. 1990). Certainly, prior threats and assaults upon the victim by the accused to prove state of mind and motive have long been admissible under the law of Indiana, and certainly the complicated and sometimes conflicting hearsay rules are not to be emboldened in constitutional stone to prevent a state court from admitting that kind of testimony.

The court is well aware of the problems that inhere under Federal Evidence Rule 404(b) of the admissibility of "other wrongs" testimony. *See United States v. Penson*, 896 F.2d 1087, 1091-1092 (7th Cir. 1990). The Supreme Court of the United States has dealt somewhat generously with that subject in *United States v. Huddleston*, 485 U.S. 681 (1988), and particularly the last paragraph of that opinion which states:

> We share petitioner's concern that unduly prejudicial evidence might be introduced under Rule 404(b). See *Michelson v. United States*, 335 U.S. 469, 475-76, 69 S.Ct. 213, 218-219, 93 L.Ed. 168 (1948). We think, however, that the protection against such unfair prejudice emanates not from a requirement of a preliminary finding by the trial court, but rather from four other sources: first, from the requirement of Rule 404(b) that the evidence be offered for a proper purpose; second, from the relevancy requirement of Rule 402—as enforced through Rule 104(b); third, from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential

> for unfair prejudice, see Advisory Committee's Notes on Fed.Rule Evid. 404(b), 28 U.S.C.App., p. 691; S.Rep. No. 93-1277, at 25; and fourth, from Federal Rule of Evidence 105, which provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted. *See United States v. Ingraham*, 832 F.2d 229, 235 (CA1 1987).

Id. at 691.

Another assertion is made that the petitioner was denied a fair trial when the state trial court allowed inhearsay testimony by labeling it "state of mind." That issue was discussed at page 451 by Justice Givan and basically it passed muster under state law. The focus now must be whether or not these evidentiary rulings violated the due process clause of the Fourteenth Amendment by denying this petitioner a fair trial. *See Haas v. Abrahamson*, 910 F.2d 384 (7th Cir. 1990).

It is not asserted that the Confrontation Clause of the Sixth Amendment of the Constitution was violated in the context of *Bruton v. United States*, 391 U.S. 123 (1968), and *Richardson v. Marsh*, 481 U.S. 200 (1987). Most recently, see the opinion of Chief Judge Bauer in *United States v. Strickland*, Nos. 89-3099, 89-3100, 89-3118, 89-3134, and 89-3135 (7th Cir. June 11, 1991), slip. at pps. 4-6.

Rather, there is a complaint that the state trial court admitted into evidence the testimony of Officer Michael Kreinhop to testify concerning his eavesdropping on petitioner's telephone call from the Dearborn County Jail. It is alleged that such was illegally obtained evidence. The Supreme Court of Indiana in addressing this issue stated:

> The officer testified to overhearing a conversation between appellant and his girlfriend, Shirley Slaughter. Appellant is apparently arguing that eavesdropping upon his conversation violated his Fourth Amendment rights and that any evidence and investigation resulting from the overhearing of the conversation should be suppressed.
>
> At trial, however, appellant's objection was not based upon his Fourth Amendment claim. His objection at trial was that there was a discovery violation, both because he had not been apprised of any statement of his own made in the telephone conversation and because any statement by Shirley Slaughter was hearsay. We further would observe that the trial court sustained appellant's objection to the content of the conversation overheard by Detective Kreinhop.

Heck v. State, 552 N.E.2d at 453.

An independent review of the record clearly indicates that the officer did not testify as to any conversation he overheard. Therefore, no constitutional violation attaches to the officer's testimony, especially in light of the fact that the trial court sustained the petitioner's objection to the content of the conversation overheard by Detective Kreinhop.

For the foregoing reasons, the petitioner's motion for Appointment of Counsel and Evidentiary Hearing should be, and hereby are, DENIED.

A careful review of the record in this case fails to disclose a basis on which relief can be granted under 28 U.S.C. § 2254. Such relief is now DENIED. IT IS SO ORDERED.

DATED: July 30, 1991

/s/ Allen Sharp
Chief Judge
Northern District of Indiana

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Case Number S91-00040

ROY HECK, SR.

v.

THOMAS RICHARDS; and INDIANA ATTORNEY GENERAL

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED BY CHIEF JUDGE ALLEN SHARP that the petitioner take nothing and relief under 28 U.S.C. § 2254 is DENIED.

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on: 7/31/91

Date July 31, 1991

RICHARD E. TIMMONS
Clerk

/s/ [Illegible]
(By) Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
Submitted September 10, 1992 *

September 18, 1992

Before HON. WALTER J. CUMMINGS, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge

No. 91-3034

ROY HECK,
Petitioner-Appellant,

v.

THOMAS RICHARDS and INDIANA ATTORNEY GENERAL,
Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division

No. 91 C 40—Allen Sharp, *Chief Judge*

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." *See* Fed. R. App. P. 34(a); Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted on the briefs and record.

ORDER

Roy Heck, serving a fifteen-year sentence in Indiana for voluntary manslaughter, *see Heck v. State,* 552 N.E.2d 446 (Ind. 1990), seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court refused to grant the writ, and we affirm.

Heck argues that the evidence against him was insufficient. He says first that the state did not adequately prove the cause of his wife's death, and second that he killed her intentionally. Our standard is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319 (1979).

Considering all the circumstances in this case, we question the reliability of Ms. Standriff's in-court identification of Heck, particularly absent evidence that she was previously familiar with his voice. Nevertheless, we conclude that even if Ms. Standriff's in-court identification of Heck was unreliable, any constitutional error in admitting her testimony was harmless beyond a reasonable doubt. *Arizona v. Fulminante,* 111 S.Ct. 1246, 1263-64 (1991). The evidence of his guilt was established without it.

Heck also argues that the trial judge erred in allowing hearsay evidence of his physical abuse of his wife which occurred prior to her death. Our review of state court evidentiary rulings is extremely limited. *Haas v. Abrahamson,* 910 F.2d 384, 389 (7th Cir. 1990). A federal court can issue a writ of habeas corpus only when such a ruling results in a denial of due process. *Id.*

The Indiana Supreme Court found that the evidence fell within exceptions to the hearsay rule because it was offered to prove Heck's state of mind and his motive for killing his wife. *Heck v. State,* 552 N.E.2d 446, 451 (Ind. 1990) (citing *Drummond v. State,* 467 N.E.2d

742, 747 (Ind. 1984)). Heck failed to show that the admission of this evidence rendered his trial fundamentally unfair. The same result obtains in the admission of Officer Kreinhop's testimony. The Indiana Supreme Court found no error, *Heck,* 552 N.E.2d at 453, and Heck did not establish otherwise.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

Date: September 18, 1992

Before: HONORABLE WALTER J. CUMMINGS,
Circuit Judge
HONORABLE RICHARD A. POSNER,
Circuit Judge
HONORABLE DANIEL A. MANION, Circuit Judge

No. 91-3034

ROY HECK,
Petitioner-Appellant

v.

THOMAS RICHARDS and INDIANA ATTORNEY GENERAL,
Respondents-Appellees

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division

No. 91 C 40, Chief Judge Allen Sharp

JUDGMENT—WITHOUT ORAL ARGUMENT

This cause came before the court for decision on the record from the above mentioned District Court.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered this date.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 89-1323

ROY HECK,
Plaintiff-Appellant,

v.

JAMES HUMPHREY, Dearborn County Prosecutor, ROBERT EWBANK, Attorney, and MICHAEL KRINOPH, Indiana State Police Investigator,
Defendants-Appellees.

Submitted July 24, 1992

Resubmitted March 1, 1993 *

Decided July 1, 1993

Before CUMMINGS, POSNER, and MANION, Circuit Judges.

POSNER, Circuit Judge.

This pro se prisoner civil rights suit charges that the defendants engineered the plaintiff's conviction for murder by, among other wrongful conduct, the destruction of exculpatory evidence. Compensatory and punitive damages were sought. The plaintiff made no effort to exhaust his state remedies against wrongful conviction, however, and this was, as the district court ruled in dismissing

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* After appointment of counsel for the appellant, and receipt of supplemental briefs dealing with the issue of equitable tolling.

the suit, a fatal omission. If, regardless of the relief sought, the plaintiff is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies, on pain of dismissal if he fails to do so. *Viens v. Daniels,* 871 F.2d 1328, 1332 (7th Cir.1989); *Scruggs v. Moellering,* 870 F.2d 376, 379 (7th Cir.1989); *Hanson v. Heckel,* 791 F.2d 93 (7th Cir.1986) (per curiam). This is such a case, as the plaintiff, while not explicitly requesting that his conviction be vacated, claims that he would not have been convicted had the defendants not violated his constitutional rights. Indeed, if his conviction were proper, this suit would in all likelihood be barred by res judicata.

The difficult question is whether the suit should have been stayed rather than dismissed lest the plaintiff be prevented by the statute of limitations from refiling it after he exhausts his state remedies. The defendants' alleged misconduct took place in 1987 and the applicable statute of limitations is only two years and is not tolled by a plaintiff's imprisonment. Ind.Code §§ 34-1-2-2, 34-1-67-1(6); *Owens v. Okure,* 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); *Bailey v. Faulkner,* 765 F.2d 102 (7th Cir.1985). So if we affirm the dismissal of his suit, and Heck should later refile after exhausting his state remedies, he will be met by a defense of statute of limitations (through, as we shall see, other state tolling doctrines may be available to him). In these circumstances several decisions of other circuits hold that the district court should stay rather than dismiss the suit. *Jewell v. County of Nassau,* 917 F.2d 738 (2d Cir. 1990) (per curiam); *Young v. Kenny,* 907 F.2d 874, 878 (9th Cir.1990); *Offet v. Solem,* 823 F.2d 1256, 1258 n. 2 (8th Cir.1987); *Richardson v. Fleming,* 651 F.2d 366, 373 (5th Cir.1981). We respectfully disagree. Such an approach gives inadequate weight to the policy

of the statute of limitations, which is to bar stale suits. Should Heck dawdle in exhausting his state remedies, this suit might resume almost a decade after the statute of limitations had expired.

If instead of being stayed, the civil rights suit is dismissed, this sets the stage for confronting the issue of staleness head-on at a time when all the facts bearing on the issue will be known—when the plaintiff, having finally exhausted his state remedies, wishes to resume the civil rights case. When the defendants plead the statute of limitations to a refiled suit, the plaintiff can riposte with the doctrine of equitable tolling—a defense to the defense of statute of limitations. The doctrine is straightforward: "a person is not required to sue within the statutory period if he cannot in the circumstances reasonably be expected to do so." *Central States, Southeast & Southwest Areas Pension Fund v. Slotky,* 956 F.2d 1369, 1376 (7th Cir.1992). It has been applied to a prisoner's civil rights case in which the statute of limitations ran while the prisoner was exhausting his state remedies. *Rodriguez v. Holmes,* 963 F.2d 799, 805 (5th Cir.1992). Rather than giving the plaintiff an automatic extension of indefinite duration, no matter how much his carelessness or sloth may have contributed to the delay in the prosecution of his claim, the doctrine of equitable tolling gives the plaintiff just so much extra time as he needs, *despite all due diligence on his part,* to file his claim. *Cada v. Baxter Healthcare Corp.,* 920 F.2d 446, 451-53 (7th Cir.1990). There must be diligence, and the diligence must continue up to the time of suit—you cannot be diligent for a year, and then wait another year to sue.

The cases that we have cited involve, it is true, the *federal* doctrine of equitable tolling. We have not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations. However, *Torres v. Parkview Foods,* 468 N.E.2d 580

(Ind.App.1984), holds that if a plaintiff in good faith files a diversity suit in federal district court but the suit is later held to be outside the diversity jurisdiction and is therefore dismissed without an adjudication of the merits, the statute of limitations for refiling the suit in state court is tolled. This is a form of equitable tolling, and the point emphasized by the court—that the filing of the suit, albeit in the wrong court, gave the defendant all the notice it needed—is equally applicable here. But should it turn out that Indiana would not apply equitable-tolling principles in the circumstances of the present case, this would be of no significance if, in that event, the federal doctrine would be applicable, and we think it would be.

It is true that, although a claim under 42 U.S.C. § 1983 is a federal claim, the statute of limitations applicable to it is a state statute borrowed for the occasion; and the Supreme Court has held that state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits. *Board of Regents v. Tomanio,* 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980); *Hardin v. Straub,* 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989). We held the contrary in *Suslick v. Rothschild Securities Corp.,* 741 F.2d 1000, 1004 (7th Cir.1984), but failed even to cite *Tomanio* (*Hardin* hadn't been decided yet). See *Smith v. City of Chicago Heights,* 951 F.2d 834, 840 (7th Cir.1992). Neither *Tomanio* nor *Hardin,* however, dealt with a situation in which a federal tolling doctrine was essential to the vindication of federal rights. Congress, in enacting 42 U.S.C. § 1988 (which provides that in the event that a federal civil rights statute is "deficient in the provisions necessary to furnish suitable remedies . . . [state law], so far as the same is not inconsistent with [federal law], shall be extended to and govern" the federal trial), intended that "gaps in federal civil rights acts should be filled by state law," *Hardin v. Straub, supra,* 490 U.S. at 538, 109 S.Ct. at 2000, but only "as long as that law is not inconsistent with federal law" and does not defeat section 1983's "chief goals of compensation and deterrence." *Id.* at 538-39, 109 S.Ct. at 2001. *Tomanio* distinguished the case where the federal right "is structured to require previous resort to state proceedings, so that the claim may not even be maintained in federal court unless such resort be had." 446 U.S. at 490, 100 S.Ct. at 1798. That is our case. If we are right that a 1983 plaintiff is not entitled to an indefinite stay while he exhausts whatever state remedies he is required to exhaust because his claim is in part one for habeas corpus, it follows that a body of state tolling law that lacks a provision for equitable tolling is inconsistent with the provision of a complete federal remedy under section 1983 and therefore is overridden by the federal doctrine. *Jewell v. County of Nassau, supra,* 917 F.2d at 740, reached a different conclusion in a similar case, but without giving reasons. Its conclusion became the basis for its ruling that the case should be stayed rather than dismissed; the court could see no other way to avoid the bar of the statute of limitations.

We think the dismissal of Heck's suit should therefore be affirmed. When and if he exhausts his state remedies and refiles this suit, and the defendants plead the statute of limitations, the district judge will have to decide whether the elements of equitable tolling have been met. The inquiry will proceed in three stages. First, was Heck's initial failure to exhaust his state remedies excusable because of the subtlety of the distinction between a pure civil rights suits that does not require exhaustion and an ostensible civil rights suit that is also a de facto habeas corpus action and therefore does require exhaustion? Second, if so, did Heck proceed with due diligence to exhaust his state remedies and to file the renewed civil rights suit as soon as possible afterward? In answering both questions the district judge will of course have due regard for the handicaps under which Heck labors by virtue of being an unrepresented prisoner presumably un-

trained in law. If both questions are answered in the affirmative, a third question becomes relevant—whether the defendants are likely to be substantially prejudiced in their defense of Heck's suit by the long delay, of which they of course cannot be blamed, in the filing of a suit not barred by the doctrine of exhaustion of state remedies. *Seattle Audubon Society v. Robertson*, 931 F.2d 590, 597 (9th Cir.1991). We express no view on the proper answers to these questions in this case; that would be premature. We hold merely that the suit was properly dismissed, rather than stayed. Because this decision creates an intercircuit conflict, we have circulated it to the entire court, pursuant to Circuit Rule 40(f). A majority of the judges voted not to hear the case en banc, Judges Cudahy, Ripple, and Rovner dissenting.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

Cause No. NA 93-108-C

ROY HECK,
Plaintiff,

vs.

JAMES HUMPHREY, ROBERT EWBANK,
and MICHAEL KRINOPH,
Defendants.

ENTRY

This cause is before the Court on the plaintiff's response to the Order of October 19, 1993. Even a careful reader of *Heck v. Humphrey*, 997 F.2d 355 (7th Cir. 1993), would be left with the impression that Mr. Heck had *still* not exhausted his state remedies—and much less that he had sought federal *habeas* relief—at the time of that decision on July 1, 1993. Such an impression would be incorrect: Heck sought *habeas* relief and was denied relief in the Northern District of Indiana in *Heck v. Richards*, No. S 91-40 (N.D.Ind. July 30, 1991), *aff'd* in No. 91-3034 (7th Cir. September 18, 1992) (unpublished order).

While the symmetry of the *habeas* claims and the claims in this civil rights case will have to be developed, it is clear that Heck has proceeded quite far in the direct and collateral challenge of his conviction *qua* conviction. He now insists on money damages from the fiends who concocted the case against him. He will get the chance.

On the basis of the foregoing, the complaint and the supplements, therefore,

IT IS NOW ORDERED that:

1. The previous denial of the plaintiff's request to proceed *in forma pauperis* is reconsidered and is now granted as delineated in this Entry.

2. The Clerk shall file the complaint and issue summonses to the defendants.

3. The Marshal for this District shall serve the defendants with the summons, a copy of the complaint and supplements and of this Entry at the expense of the United States. For the purpose of clarity, the Court construes the claims against the defendants as against them in their individual capacities only and to the extent that the plaintiff attempts to assert a claim against the defendant prosecutor or police investigator in their official capacities the plaintiff's request to proceed *in forma pauperis* is denied as frivolous pursuant to 28 U.S.C. § 1915(d).

/s/ S. Hugh Dillin
S. Hugh Dillin
Judge
United States District Court

Date: 11-3-93

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

No. na 93-108-C

Roy Heck, #874376,
Plaintiff
v.

James Humphrey, Dearborn County Prosecutor, Robert Ewbank, Attorney and Michael Krinoph, Indiana State Police Investigator, All in their official and individual capacities as such,
Defendants

COMPLAINT UNDER THE CIVIL RIGHTS ACT,
42 U.S.C. § 1983

[Filed Nov. 3, 1993]

I. *PARTIES*

(In Item A below, place your name in the first blank and place your present address in the second blank, and if you are a prisoner place your identification number in the third blank. Do the same for additional plaintiffs, if any, under Item B.)

A. Name of Plaintiff Roy Heck #874376
Address Westville Correctional Center, Westville, Ind. 46391
Identification Number 874376
(for prisoners only)

B. Additional Plaintiffs and addresses _____

(In Item C place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment and *address* in the third blank. Use Item D for the names, positions and places of employment of any adidtional defendants and *addresses*.)

C. Defendant James Humphrey is employed as Prosecutor, Dearborn County at Lawrenceburg, Ind. 47025
Robert Ewbank, Attorney Attorney at Law, Lawrenceburg, Indiana 47025
Michael Krinoph, Indiana State Police Investigator Indiana State Police Post, Versailles Indiana.

II. *PREVIOUS LAWSUITS*

A. Have you ever been named as a plaintiff in any other lawsuits in state or federal court dealing with the same facts involved in this action, or otherwise relating to your claim in this action?

YES (X) NO ( )

B. If your answer to "A" is YES, describe the lawsuit in the space below and attach a copy of your complaint in that lawsuit if you have a copy. (If there is more than one such lawsuit, you must describe the additional lawsuits on another piece of paper, using this same outline.) Failure to comply with this provision may result in summary disposition of your complaint.

1. Parties to previous lawsuit:

Plaintiff(s) Roy Heck #874376
Defendant(s) James Humphrey, Dearborn County Prosecutor Robert Ewbank, Attorney and Michael Krinoph State Police Investigator.

2. Court (if federal court, name the district (e.g. Southern District of Indiana); if state court, name the count, and state.) United States District Court for the Southern District of Indiana, New Albany Division.

3. Docket Number 88 C 209

4. Name of Judge to whom case was assigned James E. Noland

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?)

Dismissed by Southern District Court, appealed to 7th. Circuit
Dismissal affirmed, 7/1/93
7th. Circuit Court decision attached.

6. Approximate date of filing lawsuit December, 1988

7. Approximate date of disposition 1989

C. Have you ever been a plaintiff in any other civil rights lawsuit (other than those lawsuits described in your response to "B" above)?

YES (X) NO ( )

D. If your answer to "C" is YES, describe the lawsuit in the space below. (If you have been a plaintiff in more than one such lawsuit, describe the additional lawsuits on another piece of paper.)

1. Parties to previous lawsuit:

Plaintiff(s) Roy Heck #874376
Defendant(s) Russell Cunningham

2. Court (if federal court, name the district (e.g. Southern District of Indiana); if state court, name the county and state.)

United States District Court for the Southern District of Indiana, New Albany Division.

3. Docket Number NA-210-C

4. Name of Judge to whom case was assigned GENE BROOKS

5. Disposition (for example: Was the case dismissed? Was it appealed? Is is still pending?)

Dismissed by Southern District Court, Appealed to 7th Circuit, remanded and is now pending.

6. Approximate date of filing lawsuit December, 1988

7. Approximate date of disposition Pending

8. Give a brief description of the nature of the lawsuit (e.g. "I claimed the conditions of my confinement at the Indiana State Prison violated my civil rights under the Eighth Amendment.")

Plaintiff, Roy Heck was denied medical treatment by the Defendant, Russell Cunningham, sheriff of Dearborn County.

III. *PRISON GRIEVANCE PROCEDURE* (THIS SECTION TO BE COMPLETED BY PRISONERS ONLY)

A. Place of present confinement Westville Correctville Center Box 473, Westville, Indiana 46391

B. Is there a prisoner grievance procedure in this institution?

YES (X) NO ( )

C. Did you present the fact relating to your complaint in the prison grievance procedure?

YES ( ) NO (X)

D. If your answer is "YES":

1. What steps did you take? _____

_____

2. What was the result? _____

_____

E. If you did not use the griveance system, explain why not.

This cause of action does not involve the correctional center.

F. If there is not a prison grievance procedure in this institution, did you complain to prison authorities?

YES ( ) NO (X)

G. If your answer is "YES":

1. What steps did you take? _____

2. What was the result? _____

H. If your answer is "NO", explain why not.

This cause of action does not involve the correctional center.

I. Attach copies of your request for an administrative remedy and the response(s) you received. If you cannot do so, explain why not.

None

IV. *CAUSE OF ACTION*

Briefly state *which* of your constitutional rights, privileges or immunities have been violated and summarize in one or two sentences *what the defendant(s) did to violate your rights in that regard.* (You must identify individual defendants by name, but you do not need to make a detailed statement of facts here—you will have a chance

to do so in the next section.) If you are claiming that more than one of your constitutional rights was violated, use a separate paragraph for each right, privilege or immunity which was violated.

Defendants, James Humphrey, Robert Ewbank, and Michael Krinoph, acting under color of state law, conspired and/or acted in concert with a meeting of the mind to subject plaintiff Heck to an illegal investigation in violation of the Fourth, and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. 1983, 1985(2) 1986(2), and 1988.

The Defendants actions were preliminary police investigative activity to gather evidence illegally, at all times during this unlawful, unreasonable, and arbitrary investigation the defendants knew Plaintiff had clearly established U.S. Constitution and Statutory rights to be free from this type of illegal conduct by public officials, yet they override them in concert.

Defendants, Humphrey and Ewbank, even though County Prosecutors at said time, were acting as "police investigators", and not functioning in their quasi-judicial capacities against the plaintiff. All the named defendants had prior knowledge of the wrongs conspired to be done against the plaintiff, and having power to prevent or aid in the prevention of same. The defendants neglected or refused to do anything to prevent the plaintiff's civil rights from being violated.

V. *STATEMENT OF FACTS*

State here, as briefly as possible, the FACTS of your case. *State who, what, when, where and how you feel your constitutional rights were violated.* You must name or somehow refer to the people as defendants whom you contend hurt you or caused you harm in some way. Include also the names of other persons involved, dates and places. Use no more than the space provided. The court strongly disapproves of stating claims outside the space.

Do not cite any cases or statutes. If you want to include legal arguments or citations, you must do so in a separate memorandum of law. If you intend to allege a number of related claims, number and set forth each separate claim in a *separate paragraph.*

Hereafter defendants are Humphrey, Ewbank, and krinoph, the plaintiff is Roy Heck #874376.

Defendants, Humphrey, Ewbank, and Krinoph wile conducting a search of Richie Heck's trailor home on or about 1/8/86 allowed her relatives to remove items from the trailor. Defendants stated the trailor was a crime scene but did not hold as a crime scene and with defendants permission Rickie Heck's relatives removed items from the trailor, items that are lost forever, items that would have proved the plaintiff Roy Heck innocent of this crime. Defendants engineered this conspiracy to convict the plaintiff of man-slaughter, the destruction of exculpatory evidence is a clear violation of the plaintiffs civil rights.

Defendants, Humphrey, Ewbank, and Krinoph directed in concert with a mutual understanding and agreement an illegal and unlawful voice identification, with a potential state witness, without my or my attorney presence. Defendants stated to potential witness before voice I.D. began that the plaintiff roy Heck's voice was on the tape that the plaintiff was charged with this crime, was in jail, and would be going to trial for this crime, that defendants Krinoph voice was all-so on the tape and he was present at the voice I.D., only two voices played to this witness the defendant and the plaintiff, this again is a clear constitutional violation, this violation occured on or about 6/87, three times and was engineered by the defendants.

Defendants, Humphrey, Ewbank, and Krinoph knowingly destroyed exculpatory evidence. On or about November, 1986 the body of Rickie Heck was discovered, the de-

fendants acting as investigators destroyed or ordered destruction of clothing found with the body, knowing the clothing could not have fit Rickie Heck, and that to continue the investigation would have been favorable to the plaintiff Heck. Defendants all-so destroyed or ordered the destruction of hair that was found with the body, knowing the sample of hair could not have belonged to the deceased or the plaintiffs and would have proved the plaintiff innocent. All of the named defendants had prior knowledge of the wrongs conspired to be done against the plaintiff Heck, the defendants neglected or refused to do anything to prevent the plaintiffs civil rights from being violated.

VI. *RELIEF*

State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes. NOTE TO PRISONERS: If you are a *state* prisoner and seek relief which affects the length or duration of your imprisonment (for example, restoration of good time forfeited, expungement of records, parole-release decision) you *must* file your claim on an appropriate form for actions under 28 U.S.C. § 2254 (application for a writ of Habeas Corpus).

A) A declaratory judgment pursuant to 28 U.S.C.A. 2201-2202, declaring whether or not defendants violated plaintiffs clearly established constitutional Rights not to be subject to an illegal investigation.

B) Compensation in the amount of $300,000.00 from each named defendant for violating plaintiff's civil rights and his losses incurred from his employment and farm operations.

C) Punitive damages in the amount of $300,000.00 from each named defendant for violating plaintiff's civil rights.

D) Insterest and costs incurred in litigating this action if plaintiff should prevail on any of his claims.

E) Attorney fees award if plaintiff prevails on any of his claims

Signed this 16 day of August, 1993.

/s/ Roy Heck #874376
Signature of Plaintiff

AFFIRMATION OF PLAINTIFF

1. I, ROY HECK #874376, the plaintiff in the aforementioned cause, do affirm that I have read all of the statements contained in the complaint and those which are attached in the accompanying financial statement. I believe them to be, to the best of my personal knowledge, true and correct.

2. Moreover, while neither the complaint nor the financial affidavit has been notarized, I do understand that this complaint and these affidavits will become an official part of the United States District Court files and that *ANY* false statements knowingly made by me are illegal and may subject me to criminal penalties.

/s/ Roy Heck #874376
Plaintiff

SUPREME COURT OF THE UNITED STATES

No. 93-6188

ROY HECK,

Petitioner

v.

JAMES HUMPHREY, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 14, 1994

Supreme Court, U.S.
FILED
FEB 28 1994
OFFICE

(6)

No. 93-6188

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROY HECK,
Petitioner,

v.

JAMES HUMPHREY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONER

CHARLES ROTHFELD *
ALAN UNTEREINER
GARY A. WINTERS
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-1882
(202) 778-0616

* *Counsel of Record*

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QUESTIONS PRESENTED

1. Whether a federal court may "recharacterize" a state prisoner's action under 42 U.S.C. § 1983 for money damages as a petition for habeas corpus and, on that basis, require the prisoner to exhaust state habeas corpus remedies before seeking to vindicate his constitutional rights under Section 1983.

2. Whether a federal court that requires exhaustion of a Section 1983 action for money damages on this basis should stay, rather than dismiss, the Section 1983 action pending exhaustion.

RULE 24.1 STATEMENT

Pursuant to Rule 24.1 of the Rules of this Court, petitioner hereby provides the following names of parties to this proceeding whose names do not appear in the caption:

Robert Ewbank, Attorney
Michael Krinoph, Indiana State Police Investigator

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-6188

ROY HECK,

Petitioner,

v.

JAMES HUMPHREY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (J.A. 65-70) is reported at 997 F.2d 355. The opinion of the United States District Court for the Southern District of Indiana (J.A. 13-14) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1993. The petition for a writ of certiorari was timely filed on September 29, 1993, and granted on January 14, 1994, together with petitioner's motion to proceed *in forma pauperis*. J.A. 82. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 2254(b) provides in full:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

Section 7 of the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), 42 U.S.C. § 1997e, provides in pertinent part:

> § 1997e. Exhaustion of remedies
>
> Applicability of administrative remedies
>
> (a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy and effective administrative remedies as are available.

> (2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section.

STATEMENT

This case arises at the intersection of two vitally important statutes, 42 U.S.C. § 1983 and 28 U.S.C. § 2254. Petitioner Roy Heck sought damages under Section 1983 from three Indiana officials in their individual capacities on the theory that the officials conspired to violate petitioner's constitutional rights during the investigation and preparation of the case against him. See J.A. 2-7. The district court treated the damages action as a petition for a writ of habeas corpus, and on that basis dismissed it without prejudice so that petitioner could exhaust state remedies. The court of appeals affirmed, holding that such treatment was proper under Seventh Circuit law and that the district court was correct in dismissing, rather than staying, the lawsuit.

1. Petitioner was convicted of voluntary manslaughter and is presently serving a fifteen-year prison sentence in Indiana. The Indiana Supreme Court affirmed the conviction. *Heck* v. *State*, 552 N.E.2d 446 (Ind. 1990) (reprinted at J.A. 16-28).

On December 27, 1988, petitioner, proceeding pro se, filed this suit in federal court under 42 U.S.C. §§ 1983, 1985(2), 1986 and 1988. The complaint named as defendants three persons who participated in the investigation and prosecution of his case: Dearborn County prosecutors James Humphrey and Robert Ewbank, and Michael Krinoph, an investigator with the Indiana State Police. See J.A. 2. Petitioner claimed that defendants "conspired and/or acted in concert" to subject him to "an illegal investigation" of his wife's death, "in violation

of the Fourth, and Fourteenth Amendments to the U.S. Constitution." *Id.* at 3-4. Petitioner made several factual allegations in his complaint, including that defendants (1) conducted an illegal search, (2) arbitrarily, unlawfully, and knowingly destroyed evidence "which was exculpatory in nature and could have proved [his] innocence," and (3) "directed * * * an illegal and unlawful v[oi]ce identification procedure [three] times with a potential state witness." *Id.* at 5. Petitioner sought damages to compensate him for losses due to wrongful confinement, punitive damages, declaratory relief, interest, costs, and attorneys' fees. *Id.* at 7. He did *not* include a claim for injunctive or equitable relief or otherwise seek invalidation of his conviction or release from prison.

3. The district court dismissed the complaint. The gravamen of petitioner's Section 1983 claim, the court explained, was that defendants had "acted improperly in an investigation culminating in his being charged." J.A. 13. Because "the issue he raises directly implicate[s] the legality of his confinement," reasoned the court, the "exclusive means by which he may do this in federal court is through an action for habeas corpus relief, which in turn may be brought only after available state remedies have been exhausted." *Id.* at 13-14. See also *id.* at 14 (stating that "a decision on the merits of the claim presented would be tantamount to determining the legality of a plaintiff's confinement").[1]

[1] Petitioner also sought but was denied habeas relief in federal court. On June 19, 1990, more than a year after the district court dismissed his civil rights claims, he filed a petition for relief under 28 U.S.C. § 2254, raising five constitutional claims: (1) insufficient evidence to support a conviction for voluntary manslaughter; (2) use of a suggestive voice identification procedure; (3) ineffective assistance of counsel; (4) use of illegally obtained wiretap evidence; and (5) deprivation of a fair trial due to use of hearsay testimony. J.A. 29-37. On January 7, 1991, the district court dismissed the petition without prejudice because petitioner had failed to exhaust his claim that he received ineffective assistance of counsel. *Id.* at 38-39. On January 22, 1991, petitioner filed a second federal habeas petition that was identical but for the omission of the ineffectiveness claim. *Id.* at 41-48. The district court found that the remaining claims had been exhausted on petitioner's direct appeal, and went on to deny relief on the merits. *Id.* at 49-59. The Seventh Circuit affirmed. *Id.* at 61-63.

4. The Seventh Circuit affirmed. J.A. 65-70. The court first agreed with the district court that, under Seventh Circuit precedent, petitioner's civil rights action for damages was properly recharacterized as a petition for habeas corpus. *Id.* at 66. Acknowledging that petitioner was not "explicitly requesting that his conviction be vacated," the court nevertheless explained that "regardless of the relief sought," if a state prisoner "is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies * * *." *Ibid.* "This is such a case," the court continued, because petitioner "claims that he would not have been convicted had the defendants not violated his constitutional rights." *Ibid.*

Next, the court of appeals addressed the question whether "the suit should have been stayed rather than dismissed lest the plaintiff be prevented by the statute of limitations from refiling it after he exhausts his state remedies." J.A. 66. The court pointed out that under this Court's decision in *Owens* v. *Okure*, 488 U.S. 235 (1989), the statute of limitations applicable to petitioner's Section 1983 action is that set forth in Ind. Code § 34-1-2-2 (1986), which provides for a two-year limitations period; that the defendants' alleged misconduct occurred in 1987; that the Indiana statute of limitations "is not tolled by a plaintiff's imprisonment"; and that, accordingly, if petitioner "should later refile" his Section 1983 action "after exhausting his state remedies, he will be met by a defense of statute of limitations." J.A. 66. "In these circumstances," the court acknowledged, "sev-

eral decisions of other circuits hold that the district court should stay rather than dismiss the suit." *Ibid.*

The court of appeals specifically declined to follow these decisions, however, because a stay would "give[] inadequate weight to the policy of the statute of limitations, which is to bar stale suits." J.A. 66-67. The court went on to suggest that if petitioner were to exhaust his state collateral remedies, refile his Section 1983 action, and then encounter a statute-of-limitations defense, he might be able to avoid the time bar by invoking the doctrine of equitable tolling. *Id.* at 67. The panel acknowledged that under *Hardin* v. *Straub*, 490 U.S. 536 (1989), "state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits" (J.A. 68), and it further acknowledged that it had "not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations." J.A. 67. Nevertheless, the court of appeals suggested that if a state-law doctrine of equitable tolling were unavailable in these circumstances, a federal court would be obliged to fashion a *federal* doctrine of equitable tolling to effectuate "section 1983's 'chief goals of compensation and deterrence.'" *Id.* at 69 (quoting *Hardin*, 490 U.S. at 538-539).

Finally, the court of appeals proceeded to suggest the content of a federal doctrine of equitable tolling applicable in cases such as this:

> The inquiry will proceed in three stages. First, was Heck's initial failure to exhaust his state remedies excusable because of the subtlety of the distinction between a pure civil rights suit that does not require exhaustion and an ostensible civil rights suit that is also a de facto habeas corpus action and therefore does require exhaustion? Second, if so, did Heck proceed with due diligence to exhaust his state remedies and to file the renewed civil rights suit as soon as possible afterward? In answering both questions the district judge will of course have due regard for the handicaps under which Heck labors by virtue of being an unrepresented prisoner presumably untrained in law. If both questions are answered in the affirmative, a third question becomes relevant—whether the defendants are likely to be substantially prejudiced in their defense of Heck's suit by the long delay, of which they of course cannot be blamed, in the filing of a suit not barred by the doctrine of exhaustion of state remedies.

J.A. 69-70. The court "express[ed] no view on the proper answers to these questions in this case," explaining that "that would be premature." *Id.* at 70.[2]

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[2] Petitioner recently has filed a second Section 1983 complaint that restates the claims in this case (J.A. 73-81); he will attempt to prosecute that action if this suit is held to have been properly dismissed. In the course of granting petitioner's request for *in forma pauperis* status to proceed with that complaint, the district court stated that "even a careful reader of [the Seventh Circuit's decision in this case] would be left with the impression that Mr. Heck had *still* not exhausted his state remedies—and much less that he had sought federal *habeas* relief—at the time of that decision on July 1, 1993. Such an impression would be incorrect: Heck sought *habeas* relief and was denied relief * * *." J.A. 71 (emphasis in original). See note 1, *supra*. This statement is only partially correct. It is true that one of the claims advanced by petitioner in this Section 1983 action (the challenge to the allegedly suggestive voice identification procedure) was considered on petitioner's direct appeal and therefore is deemed exhausted. See, *e.g.*, *Castille* v. *Peoples*, 489 U.S. 346 (1989). But petitioner's claims that respondents destroyed exculpatory evidence and conducted an illegal search were not presented on direct appeal. Those claims, moreover, have not been considered by an Indiana court at any other time; petitioner never has invoked state post-conviction remedies. The court below therefore was correct (at least in part) in concluding that petitioner has not exhausted state remedies. J.A. 61-63.

SUMMARY OF ARGUMENT

A. It has long been settled that, as a general matter, plaintiffs may proceed in federal court under 42 U.S.C. § 1983 without first exhausting state remedies. To be sure, the Court has recognized an exception to this "no exhaustion" rule: a state prisoner must exhaust state remedies when his Section 1983 action could have been brought as a request for habeas corpus relief. But the Court has made quite clear that this principle comes into play only when the plaintiff is seeking "immediate release or a speedier release from * * * imprisonment" (*Preiser* v. *Rodriguez*, 411 U.S. 475, 500 (1973)); it has no application when "a state prisoner is seeking damages" because "[i]n the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy." *Id.* at 494 (emphasis in original).

The premise of the court of appeals' contrary conclusion in this case—that a victory by petitioner in his Section 1983 claim would have preclusive effect in a subsequent state or federal habeas action—is plainly incorrect. It is black letter law that a judgment against a state official litigating in his personal capacity (as are the respondents in this case) cannot be used to estop the state (or state officers acting in their official capacities) in future litigation. But it will be the state that will be the defendant in a subsequent action for post-conviction relief, and petitioner therefore will be unable to invoke issue preclusion in such litigation. In addition, the Seventh Circuit's holding that exhaustion is necessary whenever the prisoner's Section 1983 damages action somehow calls into question the legality of his confinement cannot be reconciled with this Court's decision in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974).

More general considerations of comity also provide no support for the Seventh Circuit's decision. Exhaustion is mandated in habeas proceedings because of the uniquely intrusive nature of the habeas remedy, which has the effect of nullifying a conviction (or sentence) and short-

circuiting the use of state judicial remedies. But an action for money damages—which are not available in state post-conviction proceedings—does not call into question the correctness of any state judicial determination, does not pretermit use of state judicial procedures (which will have to be invoked if the prisoner seeks release), and does not reflect negatively upon the state courts' ability to enforce constitutional principles. An exhaustion requirement therefore cannot be imposed in this case without calling into question the general Section 1983 "no exhaustion" rule. Such a requirement also would frustrate the policy that entitles Section 1983 litigants to a federal forum for the resolution of their constitutional claims, while creating enormously complex problems of judicial administration.

B. If the Court nevertheless concludes that exhaustion is required, it should at a minimum set aside the court of appeals' decision to dismiss rather than stay petitioner's Section 1983 action. That decision cannot be reconciled with this Court's holding in *Deakins* v. *Monaghan*, 484 U.S. 193, 202 (1988), that a district court has "no discretion" to dismiss rather than stay a federal claim for monetary relief pending the completion of related state proceedings. The decision below also is inconsistent with the manifest congressional intent: when Congress enacted the Civil Rights of Institutionalized Persons Act, it included a provision authorizing district courts, under certain circumstances, to order state prisoners suing under Section 1983 to exhaust state remedies and permitting those courts to "continue"—but not to dismiss—such Section 1983 actions pending exhaustion. 42 U.S.C. § 1997e (a)(1).

In addition, the court of appeals' approach raises the risk that a damages action, when refiled after exhaustion, will be barred by the statute of limitations. The court attempted to deal with this problem by suggesting that a federal equitable tolling rule could be applied. But such

an approach would create a new layer of wasteful and time-consuming litigation. It also inevitably would bar some meritorious Section 1983 actions that have been rendered stale by the dilatory processing of claims for state post-conviction relief. The Court should not countenance the use of such a rule.

ARGUMENT

In dismissing petitioner's civil rights action, the court of appeals evidently saw nothing exceptional in the imposition of the requirement that Section 1983 plaintiffs exhaust state remedies. But given the court's rather cursory treatment of the issue, it is worth pausing to consider the peculiarity of the holding below. The court dismissed petitioner's action pending the exhaustion of state remedies even though it is undisputed that the state post-conviction procedures to which he was committed *cannot* provide him with the *only* relief he is seeking, money damages. The court "classified" petitioner's action as a petition for a writ of habeas corpus even though he is *not* seeking release from prison or reduction of his sentence (the only relief available in a habeas proceeding) and did *not* name as a defendant the only person to whom a writ of habeas corpus may be directed, the prisoner's custodian. And the court took this action even though, as we explain below (and as Indiana has not denied), petitioner could *not* use a victory in his Section 1983 action to estop the state in a future lawsuit seeking release.

As this recital suggests, the decision below is insupportable. The court of appeals' holding is a radical departure from the usual rule, applied repeatedly by this Court, that precludes the use of exhaustion requirements in Section 1983 damages litigation. Yet the court did not, and could not, offer any justification for that departure: petitioner's claim does not raise doubts about the correctness of any state judicial determination, does not pretermit the necessity of using state post-conviction remedies if petitioner ultimately seeks release, and therefore cannot cause friction between the federal courts and the workings of the state judicial machinery. Indeed, in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the Court held that prisoners could proceed without exhaustion in a damages action that in its relevant respects was identical to the one in this case; the court of appeals' conclusion cannot be affirmed unless *Wolff* is overruled. The judgment below therefore should be reversed.

The court of appeals' further holding that petitioner's action should be dismissed rather than stayed pending exhaustion is equally flawed. That decision departs from—indeed, it takes no account of—both a controlling decision of this Court and the clearest indications of congressional intent. At the same time, the court's creation of an equitable tolling rule to save some lawsuits that its approach otherwise would render time-barred is too clever by half: it attempts to advance the policy of terminating stale claims by creating a new layer of novel and burdensome litigation. This holding also should not stand.

I. A STATE PRISONER MAY NOT BE REQUIRED TO EXHAUST STATE HABEAS CORPUS REMEDIES BEFORE PURSUING A CLAIM FOR DAMAGES THAT IS COGNIZABLE UNDER 42 U.S.C. § 1983

1. *The "No Exhaustion" Rule.* The principle that ultimately is dispositive in this case has long been settled: as a general matter, plaintiffs may proceed in federal court under 42 U.S.C. § 1983 without first exhausting state remedies. This Court noted in *Patsy* v. *Board of Regents*, 457 U.S. 496, 500-501 (1982) (emphasis in original), that it "has stated *categorically* that exhaustion is *not* a prerequisite to an action under § 1983," and that conclusion was forcefully reaffirmed in *Patsy* itself. See *id.* at 516. As the *Patsy* Court explained, an exhaustion requirement is foreclosed by the intent of the Congress that enacted Section 1983 in 1871. See *id.* at 503-507.

It is also clear from *Patsy* that, except where expressly modified by Congress, this principle applies with full force to suits brought by state prisoners. In 1980, Congress, as part of the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997e, enacted a *limited* exhaustion requirement for certain Section 1983 actions brought by state prisoners. As the Court explained in *Patsy*, CRIPA's circumscribed exhaustion requirement—which has no application here[3]—demonstrates Congress's implicit conclusion "that the no-exhaustion rule should be left standing with respect to *other* § 1983 suits." 457 U.S. at 509 (emphasis added). The limited and "extraordinarily detailed exhaustion scheme embodied in § 1997e," when viewed against the backdrop of the general non-exhaustion rule, is "strong evidence" that Congress intended exhaustion to be required in Section 1983 actions brought by state prisoners *only* in circumstances covered by CRIPA. *Id.* at 507, 509-510. See *id.* at 511 ("[t]his detailed scheme is inconsistent with discretion to impose, on an ad hoc basis, a judicially developed exhaustion rule in other cases"); cf. *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1089 (1992).[4]

[3] CRIPA permits states to require exhaustion of state remedies prior to a state prisoner's initiation of a Section 1983 action in federal court, but prescribes detailed standards for any administrative remedies and permits exhaustion only if the Attorney General or the court finds the state's plan in compliance. 42 U.S.C. §§ 1997e(a), (b). Needless to say, Indiana's system of post-conviction relief does not satisfy the CRIPA standard. Compare 42 U.S.C. § 1997e(b) with Rules of Procedure for Post-Conviction Remedies, Ind. Stat. Ann. (Burns 1993). Nor, for that matter, has Indiana obtained approval of any such CRIPA procedure. The exhaustion order in this case accordingly is not authorized under CRIPA.

[4] The legislative history of § 1997e also "provides strong evidence of congressional intent" that exhaustion be prohibited except in the designated circumstances specified in the statute. *Patsy*, 457 U.S. at 507. Congress enacted CRIPA against a background understanding that exhaustion is not generally required in 1983 actions, thereby "clearly express[ing] its belief that a decision to require exhaustion for certain § 1983 actions would work a change in the law." *Id.* at 508; see also *Felder* v. *Casey*, 487 U.S. 131, 148-149 (1988). This understanding was made clear in early hearings on the legislation. See Civil Rights for Institutionalized Persons: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess. 20-21, 33 (1977) (statement of Drew S. Days III, Assistant Attorney General, Civil Rights Division, Dep't of Justice).

2. *The Limited Habeas Exception.* To be sure, the Court has recognized an exception to the "no-exhaustion" rule. Even when the terms of Section 1983 are "literal[ly] applicab[le]" to a state prisoner's claim, the Court has held that "the specific federal habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation * * * where it * * * clearly * * * applies." *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973). But the Court has been quite specific on when a prisoner must resort to habeas rather than Section 1983: it is "when a state prisoner is challenging the very fact or duration of his physical imprisonment, *and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment*, [that] his sole federal remedy is a writ of habeas corpus." *Id.* at 500 (emphasis added). See *id.* at 488 n.8 (habeas corpus is intended "to deal with * * * attacks on physical custody").

This approach follows from the rationale for the exhaustion requirement. The Court has reasoned that, when both a habeas petition and a Section 1983 action would provide the requested relief, a prisoner must first pursue habeas as the more specific cause of action—and accordingly must exhaust state remedies as required by Section 2254(b). But for this principle to come into play, the habeas corpus remedy necessarily must, in *Preiser*'s words, "clearly * * * appl[y]." And the habeas remedy

clearly does *not* apply when the prisoner is seeking something other than release (or the shortening of his sentence).

As the Court has declared repeatedly, "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and * * * *the traditional function of the writ is to secure release from illegal custody.*" *Preiser*, 411 U.S. at 484 (emphasis added). It is "the unique purpose of habeas corpus[] to release the applicant for the writ from unlawful confinement." *Allen* v. *McCurry*, 449 U.S. 90, 98 n.12 (1980). Habeas accordingly

> lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act *only on the body of the petitioner.*

Fay v. *Noia*, 372 U.S. 391, 430-431 (1963) (emphasis added).[5] As a consequence, habeas is an appropriate

[5] The common law history of the writ of habeas corpus, which guides "the appropriate use of the writ in the federal courts" (*McNally* v. *Hill*, 293 U.S. 131, 136 (1934)), confirms that the role of habeas as a vehicle for attacking the legality of a criminal judgment cannot be understood except in conjunction with the traditional *purpose* of such an attack—an effort by a person in custody to secure immediate or speedier release. The modern writ developed from the English common law writ of *habeas corpus ad subjiciendum*, "the writ used to 'inquir[e] into illegal detention with a view to *an order releasing the petitioner.*'" *Preiser*, 411 U.S. at 484 (emphasis added) (quoting *Fay*, 372 U.S. at 399 n.5 (1963)). "By the time the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement, whether judicially imposed or not, was * * * an integral part of our common-law heritage." *Preiser*, 411 U.S. at 485. The First Judiciary Act explicitly granted to the federal courts the power to inquire into the cause of commitment, see Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82, and the Court construed this power in a manner consistent with the common-law purpose of the writ. See *Ex Parte Royall*, 117 U.S. 241, 248 (1886) ("it was the purpose of Congress to invest the courts of the Union * * * with power upon writ of habeas corpus, to *restore to liberty* any person * * * who is held in custody, by whatever authority, in violation of the Constitution or any law or treaty of the United States") (emphasis added); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). The conception of habeas corpus as providing a vehicle for overturning a criminal judgment did not change when Congress extended the writ to state prisoners, Act of Feb. 5, 1867, ch. 28, 14 Stat. 385-386, or when Congress codified habeas corpus in its modern form. See Act of June 25, 1948, ch. 646, 62 Stat. 869; Pub. L. No. 89-711, 80 Stat. 1104 (1966).

remedy, and the exhaustion requirement recognized in *Preiser* accordingly may come into play, only when the prisoner is seeking "either immediate release from * * * confinement or the shortening of its duration." *Preiser*, 411 U.S. at 489. See *Gerstein* v. *Pugh*, 420 U.S. 103, 107 n.6 (1975) (exhaustion not required when "release was neither asked nor ordered").

Conversely, it follows, as the Court also has explained repeatedly, that "habeas corpus is not an appropriate or available remedy for damages claims." *Wolff* v. *McDonnell*, 418 U.S. 539, 554 (1974). See *Allen*, 449 U.S. at 104 (the purpose of habeas "is not to redress civil injury, but to release the applicant from unlawful physical confinement"). The Court thus expressly concluded in *Preiser* that

> [i]f a state prisoner is seeking damages, he is attacking something other than the fact or length of confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, * * * a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies.

411 U.S. at 494 (emphasis in original). See *Mack* v. *Varelas*, 835 F.2d 995, 998 (2d Cir. 1987) ("a civil

rights action for damages, insofar as it does not also seek to void or shorten the term of imprisonment, is not a challenge that should be made by means of a habeas petition").

It could hardly be otherwise. Money damages are not available in a federal habeas action. See generally *Medley, Petitioner*, 134 U.S. 160, 173 (1889) ("[U]nder the writ of habeas corpus we cannot do anything else than discharge the prisoner from the wrongful confinement * * *."). Nor, for that matter, could they have been awarded to petitioner under the Indiana post-conviction remedies that he was directed to exhaust by the court of appeals.[6] In such circumstances, this is not a case in which the habeas remedy "clearly applies"—or, indeed, in which it applies at all. General principles of futility therefore dictate that Indiana's inadequate post-conviction remedies "need not be exhausted." *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 587 (1989). See also *Honig* v. *Doe*, 484 U.S. 305, 327 (1985); *McNeese* v. *Board of Educ.*, 373 U.S. 668, 674-675 (1963); *Humana of South Carolina, Inc.* v. *Califano*, 590 F.2d 1070, 1081 (D.C. Cir. 1978). In fact, it takes only a

[6] Indiana law provides three post-conviction remedies: the writ of habeas corpus, see Ind. Code § 34-1-57 (Burns 1986); post-conviction relief, see Rule 1 of the Rules of Procedure for Post-Conviction Remedies, Ind. Code Ann. (Burns 1993) (PCR Rule 1); and a motion for a new trial, see Rule 60(B), Indiana Rules of Trial Procedure (Burns 1993). None of these remedies provides for an award of damages such as petitioner seeks. See Ind. Code § 34-1-57-1; *Pruitt* v. *Joiner*, 395 N.E.2d 276 (Ind. Ct. App. 1979) (habeas corpus lies solely to inquire into the cause of detention, and remedies are injunctive in nature); PCR Rule 1 § 6 (if court finds in favor of petitioner, it "shall enter an appropriate order with respect to the conviction or sentence in the former proceedings," including ordering discharge or retrial); Rule 60(B) (authorizing court to relieve a party from judgment). See also *Burgos* v. *Hopkins*, No. 93-2006, 1994 U.S. App. LEXIS 1391, slip op. at 11-14 (2d Cir. Jan. 26, 1994) (damages are not available in New York state habeas proceedings).

moment's reflection to realize that a habeas proceeding and a damages action are entirely different animals: petitioner's Section 1983 claim would not be mooted if he were to prevail in a state post-conviction proceeding. See *Mack*, 835 F.2d at 998.

These principles should dispose of this case. In *Preiser*'s words, petitioner has not sought "a determination that he is entitled to immediate release or a speedier release from imprisonment." 411 U.S. at 500. Instead, his suit asks only for damages, for which "habeas corpus is *not* an appropriate or available federal remedy." *Id.* at 494. The rule of *Preiser* therefore does not apply; instead, the usual "no exhaustion" approach articulated in *Patsy* should be controlling.

3. *A Victory for Petitioner in his Section 1983 Suit Would Not Have Preclusive Effect in a Subsequent Action for Post-Conviction Relief.* a. In nevertheless dismissing petitioner's Section 1983 action and requiring the exhaustion of state remedies, the court below reasoned that

> [i]f, regardless of the relief sought, the plaintiff is challenging the legality of his conviction, *so that if he won his case the state would be obliged to release him even if he hadn't sought that relief*, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies.

J.A. 66 (emphasis added). The court found this to be such a case because petitioner, "while not explicitly requesting that his conviction be vacated, claims that he would not have been convicted had the defendants not violated his constitutional rights." *Ibid.* The court's concern appears to be that, if petitioner prevails in his Section 1983 action, principles of issue preclusion would estop the state from defending his conviction in a future federal habeas (or state post-conviction) proceeding; he therefore would have effectively circumvented the exhaustion requirement of Section 2254(b). We recognize that several other courts of appeals have used the same reason-

ing in requiring exhaustion of Section 1983 claims for money damages. See, *e.g.*, *Offet* v. *Solem*, 823 F.2d 1256, 1258 (8th Cir. 1987); *Hamlin* v. *Warren*, 664 F.2d 29, 30 (4th Cir. 1981), cert. denied, 455 U.S. 911 (1982).

The premise of this approach, however—that a judgment against individual state officers in a Section 1983 action for money damages would have preclusive effect in a subsequent proceeding against the state—is demonstrably incorrect. It is black letter law that a "judgment against an official who has litigated in his personal capacity is not binding on his government" (18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4458 at 508-509 (1981)); "a judgment rendered in one suit has no conclusive force in the other, if the person is a party to one suit solely as an individual, and is a party to the other solely in his capacity as a * * * public official." 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.411[3.-1], at 229-234 (1993); *id.* ¶ 0.411[4], at 242-243. See *Young* v. *Kenny*, 907 F.2d 875, 876 (9th Cir. 1990) (Kozinski, J.), cert. denied, 498 U.S. 1126 (1991).

That is the case here. Petitioner's Section 1983 action may proceed only against officers in their *individual* capacities; he may not sue either the state or persons acting in their official capacities for money damages. Because "neither a State nor its officials acting in their official capacities are 'persons' under § 1983," they may not be named as defendants under that statute. *Will* v. *Michigan Dep't of Police*, 491 U.S. 58, 71 (1989). What is more, the Eleventh Amendment provides an independent obstacle to a prisoner's federal court damages action against either the state or state officials acting in their official capacities. See *Quern* v. *Jordan*, 440 U.S. 332 (1979). As a consequence, neither petitioner nor any other prisoner bringing suit under Section 1983 in federal court can obtain a judgment for money damages against the state or state officials acting in their official capacities.

A proceeding for federal habeas or state post-conviction relief, on the other hand, is pursued against the state itself. Indiana law makes this clear: a petitioner for post-conviction relief must pursue his remedies against the State of Indiana. See Rule 1, §§ 4(a), 9(d), 12(c), 12(f), Rules of Procedure for Post-Conviction Remedies, Ind. Stat. Ann. (Burns 1993); Indiana Form For Successive Post-Conviction Relief Rule 1 Petitions.[7] Because issuance of the writ would require release of the prisoner from the state's custody, habeas corpus necessarily is an action against the state.

In these circumstances, it is plain why principles of issue preclusion are inapplicable. The law is settled that collateral estoppel may be asserted only against a party that "litigated and lost in an earlier action." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 329 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971); *Restatement (Second) of Judgments* § 27 (1982).[8] This limitation applies equally to "defensive" and "offensive" uses of estoppel. Thus, the offensive use of collateral estoppel endorsed by the Court in *Parklane Hosiery* could be invoked by petitioner (or any other plaintiff similarly situated) in a subsequent action only against the parties who are defendants in the present action. See *Blonder-Tongue*, 402 U.S. at 329.

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[7] Federal practice, and practice in some states, requires that the habeas petitioner formally proceed against "the person having custody of the person detained." 28 U.S.C. § 2243; see, *e.g.*, Tex. Code Crim. Proc. art. § 11.02 (1977) (writ is "addressed to a person having another under restraint"). But regardless of whether the named defendant is the state (as in Indiana) or a warden, a writ of habeas corpus is directed toward persons acting in their official capacities as the State's custodian of the prisoner.

[8] The preclusive effect of a federal court judgment is governed by federal law. *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 361-362 (1984); *Stoll* v. *Gottlieb*, 305 U.S. 165, 172 (1938); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4468 (1981).

But a state (and its officers sued in their official capacities) on the one hand, and officers sued in their individual capacities on the other, are considered different parties: "A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him. Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense." *Kentucky* v. *Graham*, 473 U.S. 159, 167-168 (1985). A party to be precluded in the second action must, then, have appeared in the same capacity in the first suit. See *Restatement (Second) of Judgments* § 36 (1982); *Freeman* v. *Lester Coggins Trucking, Inc.*, 771 F.2d 860, 863 (5th Cir. 1985); 18 *Federal Practice & Procedure, supra*, § 4449, at 414; 1B *Moore's Federal Practice, supra*, ¶ 0.411[3].[9]

The court below therefore was simply wrong in its assumption that the state will be "obliged to release him" if petitioner prevails in his Section 1983 action; there is no risk that he will be able to circumvent the habeas exhaustion rule of Section 2254(b) through the manipulation of issue-preclusion rules. To the contrary, a victory by petitioner in his Section 1983 action would have *no* legal consequences for the state. Indeed, we note that Indiana's brief in opposition to the petition for certiorari in this case pointedly did not suggest that the state may be estopped by judgments obtained against individual state officers. As a consequence, that petitioner's Section 1983 claim somehow calls into question "the legality of his conviction" (J.A. 66) is beside the point.

b. In fact, the Court *already* has resolved this issue in petitioner's favor. In *Wolff* v. *McDonnell*, *supra*, a group of state prisoners brought a Section 1983 action

[9] Thus, a judgment in an official-capacity suit imposes liability on the governmental entity alone. *Brandon* v. *Holt*, 469 U.S. 464, 471-473 (1985).

contending (among other things) that prison disciplinary procedures "which might result in the taking of good time violated the Due Process Clause of the Fourteenth Amendment." 418 U.S. at 553. The prisoners sought both injunctive relief in the form of restoration of the unconstitutionally taken good time and "damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures." *Ibid.* (footnote omitted).

In discussing the prisoners' constitutional claim, the Court explained that "[a]t the threshold is the issue whether under *Preiser* * * * the procedures for depriving prisoners of good-time credits may be considered in a civil rights suit brought under 42 U.S.C. § 1983." 418 U.S. at 554. *Preiser*, the Court continued, had held "that because the state prisoners were challenging the very fact or duration of their confinement and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus, with the concomitant requirement of exhausting state remedies." *Ibid.* (citation omitted). But the Court explained that *Preiser*

> was careful to point out that habeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under § 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody.
>
> The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under *Preiser*. But the complaint also sought damages; and *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. *Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed*

> *for imposing sanctions, including loss of good time,* for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damages award would not be barred by *Preiser* * * *.

Id. at 554-555 (footnote and citations omitted; emphasis added).

The court of appeals' conclusion that exhaustion must be required whenever a Section 1983 suit "challeng[es] the legality" of a prisoner's confinement cannot be reconciled with *Wolff*.[10] There, the Court—without dissent on the point—held that exhaustion was not required before prisoners proceeded with a Section 1983 action that challenged the constitutionality of the withdrawal of good time. To prevail in their damages action, the prisoners would have to demonstrate that the withdrawal of their good time was unconstitutional. It is immaterial that the prisoners' challenge in *Wolff* called into question the length of their confinement while petitioner's suit here is said to challenge the legality of his conviction; the Court

[10] *Preiser* pointed strongly in the same direction. As support for its conclusion that "a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies," the Court cited *Ray* v. *Fritz*, 468 F.2d 586 (2d Cir. 1972). 411 U.S. at 494. In *Ray*, a state prisoner also argued that he had been unconstitutionally deprived of good time credit. The court (Friendly, C.J., and Lumbard and Feinberg, JJ., writing per curiam), observed that "[o]ddly enough, although [the prisoner] was allegedly deprived of a substantial good time allowance, his complaint seeks only damages." 468 F.2d at 587. And although the court recognized the possibility "that applications by state prisoners seeking a change in the length or conditions of confinement should be regarded as petitions for habeas corpus no matter what they [are] called," the court concluded that "that view would not affect a prisoner's suit under 42 U.S.C. § 1983 seeking only damages." *Ibid.* In addition, the panel found exhaustion inappropriate when state administrative and judicial remedies would not provide the prisoner money damages. *Ibid.* As in *Wolff*, it was not material to the court that the damages action called into question the legality of the length of the Section 1983 plaintiff's sentence.

expressly held in *Preiser* that the two types of actions are indistinguishable for habeas purposes, explaining that a challenge to the duration of confinement "is just as close to the core of habeas corpus as an attack on the prisoner's conviction, for it * * * seeks either immediate release from * * * confinement or the shortening of its duration." 411 U.S. at 489. *Wolff* therefore is dispositive here.[11]

4. *Principles of Comity do Not Require Exhaustion.* We are aware of only one court of appeals that has required exhaustion prior to commencement of a damages action even while expressly recognizing the invalidity of the collateral estoppel rationale relied upon below. In *Young* v. *Kenny, supra,* the Ninth Circuit, although acknowledging that issue preclusion would not apply in a state or federal habeas proceeding that follows a Section 1983 damages claim, nevertheless suggested that exhaustion of state remedies is required by more general comity concerns. The court reasoned that

> a ruling [calling into question the constitutionality of the prisoner's confinement] would not bar a state from relitigating the issue in a subsequent state habeas proceeding because 'neither a State nor its officials acting in their official capacity are "persons" under § 1983' when the relief requested is damages. *Will,* [491 U.S. at 64]. Nevertheless, should a fed-

[11] Petitioner's position also draws strong support from *Gerstein* v. *Pugh, supra.* There, pre-trial detainees claimed that their detention without a judicial probable cause determination violated the Fourth Amendment. Although this claim obviously called into question the validity of their continued confinement (since it turned on their contention that they had been detained in disregard of constitutionally required procedures), they "did not ask for release from state custody, even as an alternative remedy." 420 U.S. at 107 n.6. Instead, "[t]hey asked only that the state authorities be ordered to give them a probable cause determination." *Ibid.* Citing *Preiser* and *Wolff*, the Court held (unanimously on the point) that "[b]ecause release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy." *Ibid.*

> eral court find a term of imprisonment unlawful without first giving the state court system an opportunity to correct its own constitutional errors, it may result in 'unnecessary friction between the federal and state court systems.' *Preiser*, 411 U.S. at 490. Were the state court then to uphold the sentence, the prisoner would be entitled to bring federal habeas, perhaps in the same district court that had earlier ruled that the sentence was unlawful. The purpose of the exhaustion requirement—to give state courts the first opportunity to rule on the claims of state prisoners—would accordingly be frustrated.

907 F.2d at 876 (parallel citation omitted).

The Ninth Circuit's assertion, however, is a statement of conclusions rather than an analysis or an explanation. It doubtless is true that it is the "purpose of the exhaustion requirement"—*when that requirement is applicable*—"to give state courts the first opportunity to rule on the claims of state prisoners." But it is perfectly clear that many claims of state prisoners (certainly all claims in which the validity of the conviction is not called into question) need not be exhausted; that is, after all, the point of the generally applicable "no exhaustion" rule endorsed in *Patsy*. The real question, which the Ninth Circuit entirely begged, is whether a case like *Young* (and like this one) involves such a claim.[12]

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[12] It may be that the Ninth Circuit's analysis is so unsatisfactory because the court initially predicated its decision entirely on the discredited collateral estoppel argument. In an initial opinion, the court opined that exhaustion was necessary because "[i]f habeas were not the exclusive federal method for challenging the length of a state prison sentence, the exhaustion requirement could be easily circumvented: A prevailing section 1983 plaintiff would obtain a federal court's ruling that his sentence is too long, a judgment that would preclude relitigation of the issue in a subsequent state habeas proceeding." *Young* v. *Kenny*, 887 F.2d 237, 238 (9th Cir. 1989). This opinion was modified when the court was advised, in a petition for rehearing, that the state could not be collaterally estopped in future habeas proceedings. The removal of the central prop for its holding, however, did not lead the court to change its conclusion.

In fact, it is manifest that, if issue preclusion against the state would not follow from the decision of a Section 1983 damages action, the more intangible and inarticulable comity concerns invoked in *Young* do not justify the imposition of an exhaustion requirement. Exhaustion is mandated in habeas proceedings because of the uniquely intrusive nature of the habeas remedy. The grant of a habeas petition (or of an injunction awarding habeas-type relief) has the effect of nullifying a conviction (or a sentence), and of short-circuiting use of state judicial remedies; after all, a prisoner released by order of a federal court will have no need to seek relief from the state. As the Court has put it, the habeas remedy empowers "even a single federal judge [to] overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question." *Sumner* v. *Mata*, 449 U.S. 539, 543-544 (1981). See also *In re Frederich*, 149 U.S. 70, 76 (1893) ("a *habeas corpus* proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or sentence of another court in a criminal proceeding").

As a consequence, a habeas proceeding may be a source of unparalleled "friction between the federal and state court systems" (*Preiser*, 411 U.S. at 490), for "it would be unseemly in our dual system of government for the federal courts to *upset a state-court conviction* without affording to the state courts the opportunity to correct a constitutional violation." *Duckworth* v. *Serrano*, 454 U.S. 1, 4 (1981) (emphasis added). See *Fay*, 372 U.S. at 419-420. It is against this background that "[t]he exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary."

Vasquez v. *Hillery*, 474 U.S. 254, 257 (1986). See *Rose* v. *Lundy*, 455 U.S. 509, 518 (1982) ("[t]he exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings").[13]

But that rationale for exhaustion simply has no application when the plaintiff seeks only damages as a remedy. An action for monetary relief that challenges the legality of a state officer's conduct does not call into question the correctness of any state judicial determination. It does not pretermit use of state judicial procedures, since a prisoner who seeks release still will have to pursue state post-conviction remedies—and it will remain open to the state court to consider the merits of the petitioner's claim. And a federal damages action does not "reflect[] negatively upon the state courts' ability to enforce constitutional principles" (*Juidice*, 430 U.S. at 336 (citations and internal quotation marks omitted)) since state post-conviction remedies do not provide for damages.

None of these points should be controversial. To the contrary, as we explain above (at 11-12), it has long been settled law that Section 1983 plaintiffs—including state prisoners—need not exhaust state remedies before

[13] Similar concerns underlie the absention rule articulated in *Younger* v. *Harris*, 401 U.S. 37 (1971), upon which the *Preiser* Court relied. See 411 U.S. at 491. The *Younger* doctrine comes into play when federal courts are called upon to enjoin or otherwise interfere with certain ongoing state judicial proceedings—an exercise of federal authority that, like the grant of a habeas petition, may carry the suggestion that state processes are in some way defective. See *Juidice* v. *Vail*, 430 U.S. 327, 336 (1977). See generally *Middlesex County Ethics Comm'n* v. *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982); *Moore* v. *Sims*, 442 U.S. 415, 430-431 (1979). The Court indicated in *Preiser* that the same policies are implicated when prison administration (in particular, the award of good time) is challenged (see 411 U.S. at 492-493); an award of good-time credit by a federal court would interfere with prison administration and pretermit recourse to state administrative and judicial procedures.

commencing Section 1983 damages actions against state officials. See, *e.g.*, *Preiser*, 411 U.S. at 498-499; *Wilwording* v. *Swenson*, 404 U.S. 249 (1971). Indeed, Section 1983 routinely is used, as in this case, to challenge assertedly unconstitutional activities of law enforcement officers. See, *e.g.*, *Malley* v. *Briggs*, 475 U.S. 335 (1986). The only distinction between this case and run-of-the-mill prisoner Section 1983 litigation is that petitioner's claim involves the events that led to his conviction. But that is a distinction without a difference so long as petitioner, to obtain release, will have to seek a remedy from a state court that remains free to deny relief if it finds that petitioner's claim is without merit. An exhaustion requirement therefore cannot be imposed in this case without calling into question the general Section 1983 "no exhaustion" approach and "mak[ing] a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Public Service, Inc. ("NOPSI")* v. *Council of the City of New Orleans*, 491 U.S. 350, 368 (1989).[14]

Even if there were any ambiguity on this point, the policies underlying Section 1983 would militate strongly against application of an exhaustion rule. It is a commonplace that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state

[14] The Court made clear in *NOPSI* that, as a general matter, "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." 491 U.S. at 373. See generally *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1087 (1992) ("federal courts are vested with a 'virtually unflagging obligation' to exercise jurisdiction given them") (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817-818 (1976)); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

law, 'whether that action be executive, legislative, or judicial.'" *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1880)). Indeed, the Court in *Patsy* recognized the "no exhaustion" rule because it found that Congress "intended [to provide] * * * individuals who * * * had suffered[] the deprivation of constitutional rights * * * immediate access to the federal courts" (457 U.S. at 504 (citation omitted)); believed that state factfinding processes might be flawed and "federal courts would be less susceptible to local prejudice" (*id.* at 506); and understood that Congress had permitted the plaintiff "to choose the forum in which to seek relief." *Ibid.* See generally, *e.g.*, *Wyatt* v. *Cole*, 112 S. Ct. 1827, 1830 (1992).

Requiring plaintiffs like petitioner to exhaust state remedies will frustrate these policies in the most profound way. That is so not only because an exhaustion requirement will force plaintiffs to seek relief from the state *first*, but also because it may preclude them from *ever* obtaining a federal forum. While a victory for petitioner in his Section 1983 damages action will not estop Indiana in future state or federal habeas proceedings (see pages 17-20, *supra*), a victory for the state in a post-conviction proceeding may well estop petitioner in a subsequent Section 1983 damages action. See generally *Allen*, 449 U.S. at 95-96.[15] Furthermore, the federal

[15] If petitioner pursues a state post-conviction remedy to judgment, a federal court in a subsequent Section 1983 action would apply Indiana law to determine the preclusive effect of that judgment. See *University of Tennessee* v. *Elliott*, 478 U.S. 788, 799 (1986) (federal court must apply the law of the rendering state to determine the preclusive effect of a prior state-court judgment). Indiana recognizes nonmutual collateral estoppel. See *Sullivan* v. *American Casualty Co.*, 605 N.E.2d 134, 137-139 (Ind. 1992) (abandoning mutuality requirement); see also *Hawkins* v. *Auto-Owners Mutual Ins. Co.*, 608 N.E.2d 1358 (Ind. 1993) (endorsing offensive, nonmutual use of issue preclusion). Under Indiana law, a defendant therefore may seek to prevent a plaintiff from relitigating an issue that the plaintiff "has previously litigated and lost against the defendant or another party." *Tofany* v. *NBS Imaging Systems, Inc.*, 597 N.E.2d 23, 27 (Ind. Ct. App. 1992). If petitioner loses in Indiana post-conviction proceedings on an issue intertwined with his damages claims, then the defendants here could invoke the issue-preclusive effect of that judgment against petitioner in a subsequent Section 1983 action. Because most states have endorsed nonmutual defensive collateral estoppel (see 1B *Moore's Federal Practice*, *supra*, ¶ 0.441[3.-2], at 734; *Restatement (Second) of Judgments* § 29, Reporter's Note (1982)), estoppel has the potential to affect virtually all prisoners who bring a Section 1983 action after exhaustion of state remedies. On the other hand, it is possible that if a prisoner brought and prevailed in a subsequent federal habeas action, the prior state judgment would lose its preclusive effect; the existence of inconsistent judgments arguably would mean that neither could be used as a source of estoppel. 18 *Federal Practice & Procedure*, *supra*, § 4404, at 26. Similarly, it is possible that a prisoner could lose in state post-conviction proceedings on a ground (such as harmless error) that does not address the merits of (and therefore cannot have preclusive effect on) the prisoner's constitutional claim.

claim may be precluded if a prisoner's misstep while litigating his claim in state court causes the claim to be dismissed, or if the state court invokes procedural default rules. Cf. *McCarthy*, 112 S. Ct. at 1090-1091 (possibility of forfeiting federal damages claim through procedural missteps in administrative grievance proceedings weighs against requiring exhaustion of administrative remedy).

That outcome, of course, would have to be borne if it were clearly required by the language or policy of Section 2254. But because that is not the case, application of the exhaustion requirement would serve as "a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence." *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490 (1973).

In addition, "[s]ound judicial policy points in the same direction." *Duckworth*, 454 U.S. at 4. The rule announced by the court of appeals may sound simple, but

its application could pose vexing complexities. When is a prisoner "challenging the legality of his conviction" within the meaning of the Seventh Circuit's approach? In any given case wrongful state conduct such as "an illegal search and seizure[] or wiretap" may or may not "undergird[] the validity of the criminal conviction to which it might be related." *Guerro* v. *Mulhearn*, 498 F.2d 1249, 1254 (1st Cir. 1974).[16] Before deciding whether to require exhaustion in such a case, a federal court presumably would have to determine whether a finding of illegality, if made in a state post-conviction proceeding, would require release of the prisoner—a determination that often will be difficult.

Related problems "might arise where it is claimed that a violation of federal rights occurred which constituted 'harmless error' at trial. Here a finding may be made that rights were violated without questioning the validity of the conviction." *Guerro*, 498 F.2d at 1254. In such a case the damages action presumably could proceed, which means that a close, threshold inquiry into the facts will be necessary to determine whether the asserted constitutional error was harmless. And as Judge Coffin explained for the First Circuit, "[a]s in any area of the law, marginal cases will arise, calling for the exercise of a delicate judgment." *Id.* at 1255.[17] Multi-volume treatises

[16] In *Guerro*, the First Circuit, relying both on *Preiser* and on *Younger* v. *Harris*, *supra*, held that a state prisoner could not bring a Section 1983 damages action during the pendency of the appeal from his criminal conviction. See 498 F.2d at 1253 ("a suit for money damages under section 1983 may * * * have a substantially disruptive effect upon contemporary state criminal proceedings, and may also undermine the writ of habeas corpus"). The validity of that conclusion is not at issue here. Cf. *Huffman* v. *Pursue*, 420 U.S. 592, 608 (1975) (*Younger* requires that defendant in state criminal proceeding exhaust appellate remedies before seeking federal injunctive relief).

[17] In *Guerro* itself, for example, the Section 1983 plaintiff contended that state officials had illegally wiretapped his telephone and "us[ed] evidence obtained thereby at his criminal trial." 498 F.2d at 1251. The court of appeals was forced to remand the case to the district court—presumably to permit an expansion of the "sparse" record—for a determination whether the claim "require[d] the court to consider the question of the legality of his conviction." *Id.* at 1255.

have been written about the litigation prompted by similar issues in "true" habeas cases (see J. Liebman, *Federal Habeas Corpus Practice and Procedure* (1988 & Supp. 1993)); by affirming the rule of *Wolff*, the Court would avoid the creation of a new sort of wasteful and time-consuming jurisdictional litigation in Section 1983 damages actions brought by state prisoners. Cf. *Patsy*, 457 U.S. at 513 (noting "difficult questions concerning the design and scope of an exhaustion requirement").

5. *The Language of the Habeas Statute Demonstrates the Unsuitability of an Exhaustion Requirement.* Finally, this conclusion draws powerful support from the precise terms that Congress used in codifying both the habeas procedure and the exhaustion requirement. The federal statutes governing habeas corpus define the action by reference to the nature of the relief being sought, providing that the "Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an *application for a writ of habeas corpus*." 28 U.S.C. § 2254(a) (emphasis added). See also *id.* § 2241 (defining judicial power to grant "writs of habeas corpus" and referring to applications "for a writ of habeas corpus"); *id.* § 2242 (referring to an "[a]pplication for a writ of habeas corpus"); *id.* §§ 2243, 2244, 2245, 2246, 2247, 2249, 2250 (same). A writ of habeas corpus is an order directing the removal of a restriction on liberty, and federal law mandates that such a writ, if granted, "shall be directed to the person having custody of the person detained." 28 U.S.C. § 2243. By the same token, the exhaustion requirement of Section 2254(b) provides that "[a]n application for a writ of habeas corpus * * * shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State."

It is one thing to say that an action seeking injunctive relief directed to the person having custody of the plaintiff (such as the suit in *Preiser*) amounts to an application for a writ of habeas corpus and therefore triggers the exhaustion requirement of Section 2254(b). But it is quite another matter to hold, as did the court below, that the exhaustion requirement comes into play even when the plaintiff does not seek the removal of any restriction on his personal liberty and has not named as a defendant the only person to whom a writ of habeas corpus may be directed—"the person having custody of the person detained." 28 U.S.C. § 2243. This language plainly suggests that, in codifying the exhaustion requirement, Congress was concerned only with the award by federal courts of the peculiarly intrusive habeas remedy. It will not do, in response, to suggest that a damages action somehow implicates the policies of Section 2254(b); "[t]he 'plain purpose' of legislation * * * is determined in the first instance with reference to the plain language of the statute itself." *Board of Governors* v. *Dimension Financial Corp.*, 474 U.S. 361, 373 (1986).

This understanding is confirmed by the structure of Section 2254(b). The provision contains an exception to the exhaustion requirement for situations where "there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." See *Duckworth*, 454 U.S. at 3 (exhaustion not necessary when "there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief"). Since actions for money damages do not invoke "state corrective process[es]" at all, the statutory langauge suggests that the exhaustion requirement simply has no application in such proceedings.

II. IF A STATE PRISONER MUST EXHAUST STATE COLLATERAL REMEDIES BEFORE SEEKING DAMAGES UNDER SECTION 1983, THE SECTION 1983 ACTION SHOULD BE STAYED, RATHER THAN DISMISSED, PENDING EXHAUSTION

For the reasons explained above, the court of appeals was wrong in requiring petitioner to exhaust his state remedies. If the Court disagrees with our submission on that point, however, it nevertheless should set aside the Seventh Circuit's decision to dismiss rather than stay petitioner's Section 1983 action pending exhaustion. That holding is inconsistent both with decisions of this Court and with the manifest congressional intent. It will, moreover, create an *additional* layer of litigation in an already over-litigated area, preclude the assertion of meritorious constitutional claims, and frustrate the purposes of Section 1983. It should be reversed.

1. *Dismissal of Petitioner's Section 1983 Action is Inconsistent With This Court's Decisions and Congressional Intent.* At the outset, the decision below cannot be reconciled with this Court's decisions. In circumstances essentially identical to those here, the Court held in *Deakins* v. *Monaghan*, 484 U.S. 193 (1988), that staying the Section 1983 action is the proper course. In *Deakins*, the targets of a criminal investigation by state officials brought suit under Section 1983 seeking the return of records and documents seized during the investigation, compensatory and punitive damages for asserted violations of their constitutional rights, and attorneys' fees. In light of the pendency of a grand jury investigation, the district court abstained under *Younger* v. *Harris*, 401 U.S. 37 (1971), and ordered the complaint dismissed.

This Court assumed without deciding that *Younger* abstention applies to Section 1983 claims for money damages and then instructed, in language equally applicable here, that a "District Court has *no discretion* to dismiss

rather than to stay claims for monetary relief that cannot be redressed in the state proceeding." 484 U.S. at 202 (emphasis added). Endorsing as "sound" the rule "requir-[ing] a District Court to stay rather than dismiss" such claims, the Court explained that the requirement "allows a parallel state proceeding to go forward without interference from its federal sibling, while enforcing the duty of federal courts to assume jurisdiction where jurisdiction properly exists." *Id.* at 202-203 (internal quotation marks omitted). The Court specifically took note of the risk that, "unless [a district court] retain[s] jurisdiction during the pendency of the state proceeding, a plaintiff could be barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations." 484 U.S. at 203 n.7; see also *Patsy*, 457 U.S. at 514 n.17.[18]

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[18] The Court has taken the same approach in other areas where comity concerns have required federal courts to abstain pending the completion of state proceedings. See *American Trial Lawyers Ass'n* v. *New Jersey Supreme Court*, 409 U.S. 467, 469 (1973) (per curiam) (*Pullman* abstention); *Lake Carriers Ass'n* v. *MacMullan*, 406 U.S. 498, 512-513 (1972) (same); *Zwickler* v. *Koota*, 389 U.S. 241, 244-245 (1967) (same); *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 391 U.S. 593, 594 (1968) (under so-called *Thibodaux* abstention, "[f]ederal jurisdiction will be retained in the District Court in order to insure a just disposition of this litigation should anything prevent a prompt state court determination"). The Court has reserved the question whether a stay or dismissal is the proper course when abstaining under *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976). See *Moses H. Cone Memorial Hosp.* v. *Mercury Construction Corp.*, 460 U.S. 1, 28 (1983). In doing so, however, the Court explained that "[w]hen a district court decides to dismiss or stay under *Colorado River*, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. If there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all." *Ibid.* Here, in contrast, as in *Deakins*, "[b]ecause the state criminal [or, in this case, post-conviction] proceeding can provide only equitable relief, any action for damages would necessarily be separate. * * * Piecemeal litigation of the issues involved in this case is thus inevitable." 484 U.S. at 204.

The reasoning of *Deakins* is squarely applicable here. The risk of forfeiture of legal rights through the running of the statute of limitations is the same in both contexts. And petitioner's claim for money damages, like the claim asserted by the plaintiffs in *Deakins*, cannot be entertained in the state proceedings to be exhausted. The district court here accordingly has the same "unflagging obligation" (*Deakins*, 484 U.S. at 203 (citation omitted)) to exercise jurisdiction over the plaintiff's claims as it did in *Deakins*.

In addition to disregarding the clear import of *Deakins*, the court below gave no weight to compelling evidence that a stay, rather than dismissal, is consistent with congressional intent. As explained above (see page 12 & n.4, *supra*), in enacting CRIPA in 1980 Congress included a limited exhaustion provision that permits a federal court, under certain circumstances, to require a prisoner to exhaust state remedies. 42 U.S.C. § 1997e(a)(1). Even if a court determines that exhaustion "would be appropriate and in the interests of justice," however, it is authorized by the statute only to "*continue* such case for a period of not to exceed ninety days in order to require exhaustion." *Ibid.* (emphasis added). Notably, Congress did not authorize dismissal of prisoner Section 1983 actions subject to CRIPA's limited exhaustion requirement, and indeed it limited the duration of any stay to a period of 90 days. See *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1089 (1992).[19]

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[19] In *McCarthy*, this Court held that a federal prisoner seeking only money damages in a *Bivens* action need not first exhaust administrative remedies in the federal Bureau of Prisons (BOP), because BOP remedies could not provide the only relief sought by the prisoner—damages. In rejecting the exhaustion rule urged by the United States, this Court relied in part on the fact that the government's rule authorized *dismissal* for failure to exhaust,

In fact, an overwhelming majority of the courts of appeals have recognized that dismissal of a prisoner's Section 1983 action pending exhaustion of state remedies is inappropriate because it exposes the claimant to the risk that his damages action, when later refiled, will be deemed barred by the statute of limitations.[20] As the Ninth Circuit has explained, dismissal "could be an unnecessarily harsh method of resolving the tension between section 1983 and the habeas exhaustion requirement" because exhaustion "may take years to complete" and "it is not farfetched to contemplate that a prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim." *Young*, 907 F.2d at 878. It "would hardly promote the goals of the Civil Rights Act of 1871," the Ninth Circuit added, "to twice deny prisoners a federal forum for section 1983 complaints, once for being too early and again for being too late." *Ibid.*[21]

2. *The Court of Appeals' Equitable Tolling Rule Will Lead to Wasteful Litigation and the Dismissal of Meritori-*

whereas Section 1997e of CRIPA—the best evidence of Congress's intent—permitted only a stay. 112 S. Ct. at 1089. Like the government's rule of exhaustion in *McCarthy*, the Seventh Circuit's rule of automatic dismissal is contrary to Congress's intent as expressed in CRIPA.

[20] *Duncan* v. *Gunter*, No. 93-1251, 1994 U.S. App. LEXIS 1706 (10th Cir. Feb. 4, 1994); *Jewell* v. *County of Nassau*, 917 F.2d 738 (2d Cir. 1990) (per curiam); *Young* v. *Kenny*, 907 F.2d 874 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991); *Prather* v. *Norman*, 901 F.2d 915 (11th Cir. 1990); *Feaster* v. *Miksch*, 846 F.2d 21 (6th Cir.) cert. denied, 488 U.S. 857 (1988); *Offet* v. *Solem*, 823 F.2d 1256 (8th Cir. 1987); *Harper* v. *Jeffries*, 808 F.2d 281 (3d Cir. 1986); *Hamlin* v. *Warren*, 664 F.2d 29 (4th Cir. 1981), cert. denied, 455 U.S. 911 (1982); *Richardson* v. *Fleming*, 651 F.2d 366 (5th Cir. 1981).

[21] In contrast, dismissing federal habeas petitions pending exhaustion poses no such risk because there is no statute of limitations applicable to a refiled habeas action. *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); *United States* v. *Smith*, 331 U.S. 469 (1947).

ous Suits. As the court below itself recognized, its decision exposes petitioner to the risk that his damages claims will be barred by the statute of limitations. See J.A. 66. The misconduct alleged in petitioner's lawsuit occurred in 1987; this action was timely filed on December 27, 1988. The statute of limitations applicable to petitioner's Section 1983 action must be borrowed from Ind. Code § 34-1-2-2 (1986), which provides a two-year limitations period for personal injury actions. See *Owens* v. *Okure*, 488 U.S. 235 (1989); *Wilson* v. *Garcia*, 471 U.S. 261 (1985). This period is not tolled by a plaintiff's imprisonment and, accordingly, if petitioner "should later refile" his Section 1983 action "after exhausting his state remedies, he will be met by a defense of statute of limitations." J.A. 66.

Acknowledging this problem, the court of appeals concluded that the prospect of a time-bar might be dealt with by invocation of the doctrine of equitable tolling—in particular, by creation of a *federal* rule of equitable tolling.[22] As we have explained, this decision to protect

[22] The court recognized that, under *Hardin* v. *Straub*, 490 U.S. 536 (1989), "state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits." J.A. 68. See *Board of Regents* v. *Tomanio*, 446 U.S. 478, 484 (1980). The court also observed that it had "not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations." J.A. 67. The State of Indiana agreed, in its supplemental brief filed below, that equitable tolling is unavailable under Indiana law in a case such as this one.

While the court of appeals identified *Torres* v. *Parkview Foods*, 468 N.E.2d 580 (Ind. Ct. App. 1984), as a case in which an Indiana court applied what the panel described as "a form of" equitable tolling (J.A. 67-68), that decision almost certainly would not apply here. In *Torres*, the plaintiff mistakenly filed a lawsuit in federal court that was dismissed for lack of diversity. The court held that the statute of limitations was suspended at the time of the federal filing and that a subsequent state action could be initiated outside of the original limitations period. 468 N.E.2d at 583. *Torres* was based on the Indiana Journey's Account Statute, Ind. Code § 34-1-2-8 (1986 & Supp. 1994), which provides that if a plaintiff's lawsuit "fails," a new action may be brought within

the rights of federal litigants by dismissing their Section 1983 actions and creating an equitable tolling rule that might later revive the claims—rather than through the simple expedient of staying the Section 1983 action—cannot be reconciled with *Deakins*, with the federal courts' more general obligation to exercise the jurisdiction conferred by Congress, or with the manifest congressional intent expressed in CRIPA. But the Seventh Circuit's approach is insupportable even on its own terms: it will retard judicial economy, disserve the interests of litigants, and frustrate the purposes of Section 1983 by leading to the dismissal of meritorious claims.[23]

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five years. That statute, however, provides an extension only if the decision in the first action *was not on the merits*. *Vesolowski* v. *Repay*, 520 N.E. 2d 433, 435 (Ind. 1988). In *Torres*, of course, the dismissal for lack of diversity jurisdiction was not on the merits, so the second suit could proceed. But neither *Torres* nor the Journey's Account Statute speaks to the situation here, where a plaintiff whose case is dismissed must then engage in a full round of collateral litigation in another forum before he can again present his claim. There is no provision in Indiana law for extending the statute of limitations if petitioner seeks post-conviction relief in the state courts and receives a determination on the merits. The court below, however, was not troubled by this point, explaining that "should it turn out that Indiana would not apply equitable tolling principles in the circumstances of the present case, this would be of no significance if, in that event, the federal [tolling doctrine] would be applicable, and we think it would be." J.A. 68.

[23] In fact, it is doubtful that a federal court has the authority to create a federal equitable tolling rule in the circumstances of this case. On three occasions this Court has specifically declined to substitute a federal for a state tolling rule in a Section 1983 action, cautioning against "unravel[ing] state limitations rules" that apply to federal suits. *Hardin*, 490 U.S. at 539; *see id.* at 540-544; *Chardon* v. *Fumero Soto*, 462 U.S. 650, 655-662 (1983); *Board of Regents* v. *Tomanio*, 446 U.S. 478, 492 (1980). Cf. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975) (declining to adopt a federal tolling rule in cases arising under 42 U.S.C. § 1981). The court below nevertheless concluded that if Indiana law would not excuse petitioner from compliance with the statute of limitations, a federal tolling rule would have to

Although the court below appeared to believe otherwise, its invocation of equitable tolling cannot be dismissed as a harmless frolic and detour that simply takes an alternative route to the same result (preservation of otherwise time-barred Section 1983 claims) as would be achieved by staying the federal action. To the contrary, the approach taken by the Seventh Circuit creates a new layer of wasteful and time-consuming litigation. Resolution of disputes about whether the statute of limitations should be tolled will require the expenditure of very substantial judicial resources. Federal courts will first have to examine state tolling rules—which is far from a simple matter (see *Chardon*, 462 U.S. at 667 (Rehnquist, J., dissenting))—to determine whether state law affords the plaintiff an equitable defense to the statute of limitations. This is likely to be a particularly difficult inquiry in the context of cases such as this one, which do not have state-law analogues and hence are not likely to give rise to decisional law on point.

If state tolling rules do not preserve the federal claim, petitioner (and other plaintiffs like him) must, under the

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apply because it would be "essential to the vindication of federal rights." J.A. 68. But while this Court has recognized the possibility that state statutes of limitations and related tolling doctrines might not be used in Section 1983 litigation when their use "would defeat the goals of the federal statute" (*Hardin*, 490 U.S. at 539), the Court declined to apply that exception in *Hardin*, *Chardon*, and *Tomanio*. As the Court has explained, "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Tomanio*, 446 U.S. at 488 (internal quotations omitted); cf. *Robertson* v. *Wegmann*, 436 U.S. 584 (1978) (applying state survivorship statute even though it precluded continuation of Section 1983 action). At least one court of appeals has held that this principle precludes the creation of a federal equitable tolling rule where a state prisoner is required to exhaust state remedies prior to proceeding with a Section 1983 damages action. *Jewell* v. *County of Nassau*, 917 F.2d 738, 739-740 (2d Cir. 1990). The court therefore ordered the Section 1983 claim stayed rather than dismissed. See *id.* at 740.

court of appeals' approach, then clear three distinct hurdles to avoid a time-bar under the federal rule. First, petitioner's "initial failure to exhaust his state remedies" must be "excusable because of the subtlety of the distinction between a pure civil rights suit that does not require exhaustion and an ostensible civil rights suit that is also a de facto habeas corpus action and therefore does require exhaustion." J.A. 69. Second, the court must determine that the plaintiff "proceed[ed] with due diligence to exhaust his state remedies and * * * file[d] the renewed civil rights suit as soon as possible afterward." *Ibid.*[24] And if the plaintiff satisfies both of these requirements, "a third question becomes relevant—whether the defendants are likely to be substantially prejudiced in their defense of [petitioner's] suit by the long delay." *Id.* at 70.

All of these inquiries will be fact- and case-specific and, necessarily, time-consuming. Indeed, the analysis mandated by the court of appeals generally will be far more complex than an examination of the merits. As this Court has noted, "[o]ur experience teaches us that the vast majority of prisoner cases are resolved on the complaint alone. Of those prisoners whose complaints survive initial dismissal, few attempt discovery and fewer still actually obtain it." *Cleavinger* v. *Saxner*, 474 U.S. 193, 208 (1985). And that is particularly likely in cases such as this one, for many prisoner claims will be precluded by an adverse determination in state post-conviction proceedings. The court's decision therefore will lead to a

[24] To the extent that the court's approach is designed to penalize a plaintiff for inexcusable dilatoriness in pursuing his claim (see J.A. 67), a district court may exercise its inherent power, following the issuance of a stay, to take such actions as may become necessary to respond to occurrences in the state court proceedings. *Harrison* v. *NAACP*, 360 U.S. 167, 178 (1959); *Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32, 44 (1st Cir. 1984); *New Jersey-Philadelphia Presbytery* v. *New Jersey State Bd. of Higher Educ.*, 654 F.2d 868, 887-888 (3d Cir. 1981).

new and uniquely burdensome round of procedural litigation in prisoner Section 1983 actions.

3. By the same token, the approach charted by the Seventh Circuit, in addition to being longer and rockier than the course of simply staying a Section 1983 action pending exhaustion, does not necessarily lead to the same destination. Under the equitable tolling rule recognized by the court of appeals, a plaintiff may be time-barred through no fault of his own because delay has prejudiced the defense—even though the plaintiff acted with diligence and his failure to exhaust was "excusable." J.A. 69. If this rule is applied strictly, it inevitably will bar some meritorious Section 1983 actions; if the rule is applied loosely, it will require a large volume of additional litigation that is to no one's benefit.

The court of appeals' sole rationale for the erection of this elaborate structure was the passing observation that the expedient of staying a Section 1983 action pending exhaustion "gives inadequate weight to the policy of the statute of limitations, which is to bar stale suits." J.A. 66-67. But the court sought to advance that policy by ignoring both sound principles of judicial economy and the paramount goals of Section 1983: deterring, and providing compensation for, violations of the Constitution. Indeed, the court's approach would reward a state with the dismissal of an action against its officers whenever the state itself made the claim "stale" through the dilatory processing of claims for post-conviction relief. This Court should not countenance the use of a rule that accomplishes so little at such substantial cost.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROY HECK,

Petitioner,

v.

JAMES HUMPHREY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

1. Whether a state prisoner attacking the legality of his conviction may circumvent the exhaustion requirement of 28 U.S.C. § 2254(b) by filing an action under 42 U.S.C. § 1983 and confining his prayer for relief to a declaratory judgment and money damages.

2. Whether a state prisoner's action attacking the legality of his conviction that includes unexhausted claims should be dismissed without prejudice, rather than stayed, pending exhaustion of state remedies.

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No. 93-6188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROY HECK,

Petitioner,

v.

JAMES HUMPHREY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENTS

STATEMENT

Petitioner, a state prisoner, has attacked the legality of his conviction in a federal action purportedly brought under 42 U.S.C. § 1983, seeking monetary and declaratory relief. The district court dismissed the action without prejudice, finding that petitioner must exhaust state remedies. The court of appeals affirmed.

1. The facts surrounding this case are tragic. Petitioner had a long history of violently abusing his wife. App. 12-13;

19-20.[1] In response to his repeated violence against her, she separated from him, filed for a divorce, sought and obtained a civil restraining order, pressed criminal charges, and sought police protection. App. 4-9. Ultimately, the legal system was incapable of protecting her, and shortly before petitioner was scheduled for trial on criminal charges arising out of the abuse, he forced his way into her home and killed her. App. 29. He then unceremoniously buried her body in a sinkhole on his farm and asked others to dump refuse over the grave to hide his crime. J.A. 18. He told the victim's children and other family members that she had confided in him that she was leaving town for an unknown destination and would be gone for an unspecified period of time. *E.g.*, J.A. 17; App. 14. Understandably suspicious, they asked police to investigate. App. 26-27. When petitioner learned of the police investigation of his wife's disappearance, he asked his girlfriend and daughter to telephone the police and pretend to be his wife. J.A. 17-18. Some ten months later, in October of 1986, pursuant to a search warrant, the victim's body was discovered with the cord of a curling iron found wrapped around her neck. App. 31-32. Petitioner was immediately charged with her murder, and was convicted by a jury of voluntary manslaughter. J.A. 16.

The sufficiency of the evidence against petitioner is firmly established by both the opinion of the Indiana Supreme Court on direct appeal, J.A. 18-20, and by subsequent

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[1] Citations in the form "App. ___" are to the Appendix bound with this brief. The materials so included are from the record of petitioner's criminal trial, which were also part of the record before the Seventh Circuit when it passed upon the appeal from the denial of his petition for writ of habeas corpus. *See* J.A. 64. Because those materials consisted of original state court records, they were returned to the State of Indiana following disposition of that appeal, and are presently in the possession of the State. Respondents will, of course, make those original materials available should either petitioner or the Court wish to review them.

judgments of a federal district court and court of appeals on *habeas corpus* review, J.A. 54; 62.[2] Indeed, the court of appeals found the evidence so one-sided that it rejected his claim of error in the admission of a supposedly suggestive voice identification, finding the error, if any, "harmless beyond a reasonable doubt." *Id.*

2. While his direct criminal appeal was still pending, J.A. 16, he filed this action, claiming entitlement to damages for an allegedly "unlawful, unreasonable, and arbitrary investigation." J.A. 5. According to petitioner, defendants prevented him from "prov[ing] my innocence of this crime." *Id.* In his complaint below, he made three claims:

> Between May and July, 1987:
>
> 1. Defendants . . ., after conducting a search in 1986 of my deceased wife's trail[e]r home, took items from her relatives and used them in their unlawful, unreasonable, and arbitrary investigation of me because they. . . believed me to be responsible for her death.
> 2. They also arbitrarily, unlawfully, unreasonably and knowingly destroyed clothing from my deceased wife's body which was exculpatory in nature and could have proved my innocence of this crime.
> 3. These named defendants directed . . . an illegal and unlawful v[oi]ce identification procedure (3) times with a potential State witness, without my or my attorney's presence.

Id. In his brief in this Court, he claims he is entitled to "damages to compensate him for losses due to wrongful

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[2] With the exception of the voice identification claim, the claims petitioner raised on habeas do not overlap with those contained in his complaint. *See* J.A. 46-47.

confinement, punitive damages, declaratory relief, costs and attorneys fees." Pet. Br. at 4.

Despite the suggestion to the contrary in his brief to this Court, Pet. Br. at 4, petitioner did not claim an illegal search, or seek any damages in connection therewith. The last of the searches, the one in which his wife's body was finally found, took place in October, 1986, well before the April-July, 1987, time frame of the allegations of the complaint. App. 31. Nor is petitioner correct in claiming that the legality of this search has "not been considered by an Indiana court at any other time." Petitioner raised his claim of illegality in the State trial court, but that claim was denied. App. 1-2. The claim was not renewed on his direct appeal.[3]

3. Under 28 U.S.C. § 1915(d), the district court dismissed petitioner's claim as frivolous because he had not exhausted his State remedies and therefore could not challenge the legality of his conviction. J.A. 13-14.

The Seventh Circuit affirmed, concluding that petitioner's claim, which "challeng[ed] the legality of his conviction" was properly "classified as an application for habeas corpus and the plaintiff must exhaust his state remedies." J.A. 66. The more difficult question, according to the court of appeals, "is whether the suit should have been stayed rather than dismissed lest the plaintiff be prevented by the statute of limitations after he exhausts his state remedies." *Id.* Nonetheless, the court of appeals concluded that Indiana law would provide plaintiff adequate relief in such a situation, and if it did not, federal law would do so. J.A. 67-69. Accordingly, the court of appeals concluded the dismissal was

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[3] Moreover, petitioner would have no standing to object to the search of his *wife's* home following her disappearance. *See United States v. Padilla*, 113 S. Ct. 1936 (1993); *Alderman v. United States*, 394 U.S. 165, 171-74 (1969); *Mabry v. Gray*, 518 F.2d 512 (7th Cir. 1975) (Stevens, J.).

proper and therefore affirmed. J.A. 69. This Court granted certiorari. J.A. 82.

SUMMARY OF THE ARGUMENT

I. Petitioner's claim is an attack on the legality of his conviction and the propriety on his continued confinement. As such, a federal court should not consider the merits of his claim, much less grant relief, unless petitioner has exhausted state remedies. With regularity, this Court has found that the federal courts should postpone or decline plenary consideration of claims under 42 U.S.C. § 1983 in order to accommodate other federal policies. *See Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981). In fact, this Court has applied that general principle where, as here, a state prisoner seeks to avoid 28 U.S.C. § 2254(b)'s exhaustion requirement by filing an action under § 1983. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). Habeas corpus, this Court held, is the exclusive remedy when a state prisoner challenges the "fact or duration of his confinement." *Id.* at 489.

As *Preiser* recognized, the exhaustion requirement is rooted in considerations of comity found to be fundamental by this Court long before Congress codified it in 1948. *Ex parte Royall*, 117 U.S. 241, 251 (1886). *Preiser* refused to allow the comity interests served by exhaustion to be defeated "by the simple expedient of putting a different label on [the] pleading." 411 U.S. at 489-90. But that is precisely what petitioner attempts to do here.

As a predicate to an award of damages, a federal court necessarily would have to "determin[e] that he is entitled to immediate release * * * from confinement." *Preiser*, 411 U.S. at 500. That determination, regardless of whether the federal court actually grants release, would deprive the state courts of the opportunity to decide initially if petitioner's

constitutional claims were violated. As a practical matter, moreover, the federal determination could directly lead to a state prisoner's release, either because of its persuasive (and intrusive) effect on a state court or its precedential effect on a federal habeas court. And as a legal matter, the federal judgment may well have preclusive effect on the state in a subsequent action seeking release, if the state exercised adequate control over the initial federal action. *Montana v. United States*, 440 U.S. 147, 154 (1979). All of these results are inimical to the interests of comity served by the exhaustion rule.

Not only is petitioner attempting to use § 1983 to challenge the legality of his confinement—something *Preiser* does not permit—but he is also seeking to attack a valid Indiana conviction. Petitioner's claim, therefore, raises comity concerns above and beyond those present in *Preiser*, making exhaustion even more strongly warranted here. This Court has consistently held that a federal § 1983 action cannot be used to review collaterally the propriety of a state-court judgment, particularly a criminal one. *Younger v. Harris*, 401 U.S. 37 (1971); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). A federal determination that petitioner's conviction was unlawful and his confinement improper would conflict irreconcilably with his valid state judgment of conviction, and thereby create "unnecessary friction between the federal and state court systems." *Preiser*, 411 U.S. 490. Nor may the policies behind the requirement be avoided by the simple expedient of foregoing the available state remedies, as petitioner has done here. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975).

Petitioner's argument that the relief sought in a § 1983 complaint is the sole determinant of whether exhaustion is required is flatly inconsistent with this Court's precedent. In *Preiser* and *Fair Assessment*, this Court held that it is the substance of a § 1983 complaint, not its form, that determines whether and when a federal court will entertain its claims.

Indeed, that result is the only rational one, for the fact that petitioner has sought only damages does nothing to avoid the comity concerns of § 2254 that would be compromised if a federal court were to consider his claim. Nor does petitioner have an immediate need to obtain the relief he seeks. This Court and Congress both have determined that a state prisoner's interest in immediate federal adjudication is subordinate to the interests of comity when a prisoner is seeking release. Surely a prisoner's interest in money damages is not more weighty than the interest in the restoration of his liberty. An immediate federal forum is also not needed to adjudicate petitioner's underlying claims. Through the habeas statutes, Congress has concluded that where, as here, a state prisoner attacks the legality of his conviction, the state courts are the superior forum to adjudicate those claims initially.

II. The Seventh Circuit was also correct to dismiss, rather than stay, petitioner's action pending exhaustion of state remedies. This Court has repeatedly held that dismissal is required when a petition for habeas corpus relief contains unexhausted claims. For both legal and practical reasons, there is no sound basis to deviate from that rule here. Petitioner's suggestion that the Seventh Circuit's rule will result in the dismissal of meritorious claims cannot be squared with the collective experience of our courts. The various immunity doctrines cause the vast majority of claims such as petitioner's to be disposed of as frivolous either upon or soon after filing. For the minuscule number of cases that are left, existing case law, both state and federal, adequately protects claims that are meritorious from a statute of limitations bar—the only possible justification for petitioner's proposed stay rule. Thus, there is simply nothing to be gained by petitioner's approach, while on the other, his proposal would impose significant burdens on the federal courts by requiring the retention of thousands of frivolous lawsuits on their dockets.

ARGUMENT

I. A STATE PRISONER MAY NOT ATTACK THE LEGALITY OF HIS CONVICTION IN AN ACTION UNDER SECTION 1983 WITHOUT EXHAUSTING STATE REMEDIES.

At the outset, it is important to clarify the precise nature and context of petitioner's claim. Petitioner was convicted in an Indiana trial court; that conviction was affirmed by the Indiana Supreme Court and left undisturbed on federal habeas corpus review. J.A. 16-27, 61-63. In this federal action, petitioner now claims that he is innocent and thus ought not be in prison. J.A. 5. In addition to seeking declaratory relief, petitioner seeks money damages that are tied to the alleged wrongfulness of his confinement. Pet. Br. 4. Neither in his complaint nor at any other time throughout these proceedings has petitioner suggested that his claimed damages relate to anything other than his contention that his conviction was wrongful and his continued confinement improper.[4] The issue in this case, therefore, is a narrow one: may a state prisoner use a § 1983 action to attack the legality of a valid

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[4]The Seventh Circuit, for example, rested its decision on the fact that petitioner's request for damages flowed from his alleged wrongful conviction and confinement. J.A. 65-66. Yet in his petition for certiorari or in his brief on the merits, petitioner did not assert that the court below misunderstood petitioner's claim. His complaint similarly makes clear that the claimed damages are tied to his conviction and confinement, as the only tangible items of damages specified are petitioner's "losses incur[r]ed from his empl[o]yment and farm operations," presumably because he could not engage in them while imprisoned. *See* J.A. 7. While petitioner's counsel may now attempt to suggest he is claiming something else, *see* Pet. Rep. Br at 8 n.6 ("in fact, petitioner seeks *both* lost income and compensation for the violation of his constitutional rights") (emphasis in original), it is clear that "the abstract value of a constitutional right may not form the basis for § 1983 damages." *Memphis Community School District v. Stachura*, 477 U.S. 299, 308 (1986) (footnote omitted).

state-court conviction and thereby circumvent the exhaustion requirement mandated by Congress in 28 U.S.C. § 2254(b)?

Both the district court and the court of appeals properly rejected petitioner's claim. The exhaustion requirement first enunciated by this Court and later codified by Congress implements fundamental principles of comity necessary to our federal system of government. Congress's explicit mandate that state prisoners must exhaust their state remedies before attacking their convictions in federal court would be rendered wholly meaningless if a state prisoner could secure federal review of his conviction by the simple expedient of confining his prayer for relief to money damages. Not only would petitioner's approach deprive the state courts of the initial opportunity to decide petitioner's constitutional claims, but as a practical matter, and possibly as a legal matter, a damages award by a federal court could directly lead to petitioner's release—a result that would be "unseemly." *Duckworth v. Serrano*, 454 U.S. 1, 4 (1981).

At its core, petitioner's argument rests on formalism. He contends that the factual and legal issues that a federal court would have to determine as a predicate to an award of damages, and the consequences that would surely follow from those determinations, are entirely irrelevant to whether he must exhaust state remedies. As petitioner would have it, the need for exhaustion turns exclusively on the relief he seeks. But this approach is utterly irrational and, not surprisingly, inconsistent with this Court's precedent.

A. A State Prisoner's Challenge to the Lawfulness of His Conviction and Confinement Requires Exhaustion of State Remedies.

42 U.S.C. § 1983 contains broad language that allows actions claiming a deprivation of federal rights under color of state law to be brought in federal court. But that language says nothing about when and under what circumstances a federal court should grant relief, except that it should be

provided in a "proper proceeding for redress." Under this language, plenary consideration of claims may be postponed or even declined in order to accommodate other federal policies. *Cf. Allen v. McCurry*, 449 U.S. 90, 103 (1980) (rejecting idea that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the federal claim arises."). In particular, the absence of a general exhaustion requirement under § 1983 (*Patsy v. Board of Regents*, 457 U.S. 496, 500-01 (1982)), on which petitioner anchors his argument, has never been viewed by this Court as foreclosing particular exhaustion requirements in defined circumstances where other federal policies make such a requirement appropriate. *See Tower v. Glover*, 467 U.S. 914, 923-24 (1984) ("We therefore have no occasion to decide if a Federal District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself."); *Juidice v. Vail*, 430 U.S. 327, 339 n.16 (1977).

One example of this general principle is *Preiser v. Rodriguez*, 411 U.S. 475 (1973), a decision whose soundness petitioner does not question. In *Preiser*, this Court held that an action formally brought under § 1983 was nonetheless subject to an exhaustion requirement. The Court observed that a state prisoner's challenge to the "fact or duration of his confinement" lies at the "core of habeas corpus." *Id.* at 489. Habeas corpus, the Court thus held, is the *exclusive* remedy "when a state prisoner is challenging the very fact or duration of his physical confinement, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment." *Id.* at 500. The Court recognized that "the literal terms of § 1983 might seem to cover such a challenge," but nevertheless concluded that through 28 U.S.C. § 2254, "Congress has passed a more specific act to cover the situation." *Id.* at 489.

A second critical example for purposes of the present case is *Fair Assessment in Real Estate Association, Inc. v. McNary*, 454 U.S. 100 (1981). There, this Court held that a federal court should not hear a damages action brought under § 1983 against state taxing officials, even though the Tax Anti-Injunction Act, 28 U.S.C. § 1344, only bars injunctions. The Court reasoned that the comity principles embodied in the Tax Anti-Injunction Act were enough to foreclose the § 1983 action, notwithstanding the absence of a direct statutory overlap. *Fair Assessment*, like *Preiser*, demonstrates that although a statute addresses a particular form of relief, the policy considerations underlying that statute can be strong enough to limit the availability of other forms of relief as well. That principle applies here.

1. *The Comity Considerations Underlying Section 2254 Require Exhaustion Whenever a State Prisoner Is Attacking the Legality of His Confinement.* As this Court explained long ago, the requirement that state prisoners exhaust all state remedies before resorting to federal habeas corpus is rooted in fundamental considerations of comity:

> We cannot suppose that Congress intended to compel * * * [the federal] courts * * * to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts * * *. The injunction to hear the case summarily, and thereupon "to dispose of the party as law and justice require" does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound

> to guard and protect rights secured by the Constitution.

Ex parte Royall, 117 U.S. 241, 251 (1886). *See also, e.g., Ex parte Hawk*, 321 U.S. 114, 119 (1944). After Congress codified the exhaustion requirement in 1948, *see* 28 U.S.C. § 2254(b), this Court has continued to emphasize that its source lies in considerations of comity, and has construed the habeas statute to preserve that interest. *See Rose v. Lundy*, 455 U.S. 509, 518 (1982); *see also, e.g., Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720-21 (1993); *McCleskey v. Zant*, 499 U.S. 467, 491 (1991); *Teague v. Lane*, 489 U.S. 288, 308 (1989).

When state courts are afforded the first opportunity to review constitutional claims brought by their own prisoners, the interests of comity are served in several respects. State courts "become increasingly familiar with and hospitable toward federal constitutional issues. Equally as important, federal claims that have been fully exhausted in state courts will more often be accompanied by a complete factual record to aid the federal courts in their review." *Rose*, 455 U.S. at 519 (citations omitted). Exhaustion also allows the state courts' supervisory system to oversee the lower courts and impose uniformity on them. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 (1975). Thus, the principles of comity underlying the exhaustion rule require not only that states be allowed the first opportunity to release their own prisoners, but also the initial opportunity to *decide* the issues that might justify release.

The rule this Court announced in *Preiser v. Rodriguez*—that habeas corpus is the exclusive remedy when a state prisoner challenges the fact or duration of his confinement—is squarely grounded on the comity concerns animating the exhaustion requirement. This Court stressed that "the reason why only habeas corpus can be used to challenge a state prisoner's underlying conviction is the strong policy requiring

exhaustion of state remedies in that situation—to avoid the unnecessary friction between the federal and state court systems that would result if a lower federal court would upset a state court conviction without first giving the state court system an opportunity to correct its own constitutional errors." 411 U.S. at 490 (citing *Fay v. Noia*, 372 U.S. 391, 419-20 (1963)). *See also id.* at 491 ("The rule of exhaustion in federal habeas corpus is rooted in considerations of federal-state comity.") (citing *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

Directly rebutting petitioner's argument here, the Court in *Preiser* explained that principles of comity demand that a complaint's substance, not its form, controls whether exhaustion is required.

> It would wholly frustrate congressional intent to hold that the respondents in the present case could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleading. In short, Congress determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of § 1983.

411 U.S. at 489-90.

Preiser's focus on the comity interests served by § 2254(b) demonstrates that the exhaustion requirement applies to all prisoner claims challenging the legality of confinement—and most certainly to petitioner's here. Petitioner cannot deny he is "challenging his conviction" (411 U.S. at 489) within the meaning of that phrase in *Preiser*. He contends, however, that by restricting the relief he requests to damages, he is not seeking a "determination that he is entitled to immediate release or a speedier release from confinement." Pet. Br. at 13, 17 (quoting *Preiser*, 411 U.S. at 500). But to

award damages, a federal court would have to first find that petitioner's conviction was wrongful and his confinement improper. That finding would necessarily constitute a "*determination* that he is *entitled* to immediate release * * * from confinement," 411 U.S. at 500 (emphasis added), even though he has, for whatever reason, declined to request it. "[I]n effect the district court must first enter a declaratory judgment" that Heck is entitled to release. *Fair Assessment*, 454 U.S. at 113. As a matter of rudimentary logic, if Heck were not entitled to release, he would have suffered no damages for wrongful confinement. A federal § 1983 court need not actually grant release in order to make a determination that a prisoner is so entitled. *See id.*

It is inescapable that a federal court's determination in a § 1983 action that a state prisoner is entitled to release, irrespective of whether it orders release, would undermine the comity interests § 2254(b) is intended to protect. The state court would be deprived of the opportunity to *decide* whether the prisoner's constitutional rights were violated. Concomitantly, the state courts would be prevented from developing a factual record—a role that Congress expressly reserved for them. 28 U.S.C. 2254(d); *see also Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1719 (1992); *Rose*, 455 U.S. at 519. The federal court's determination would also frustrate Congress's interest in increasing state courts' familiarity with and hospitality toward federal constitutional issues. *See Rose*, 455 U.S. at 519.

Aside from these structural concerns, as a purely practical matter, a federal court's determination that a state prisoner's confinement is wrongful would go a long way, if not the entire way, toward securing that prisoner's release. In a subsequent state post-conviction proceeding, a state court in most instances would be exceedingly reluctant to disregard the federal court's determination. The state prisoner would thus begin the state proceeding with a strong presumption of success in his favor, and the federal judgment would exert an

intrusive and uninvited presence over the subsequent proceeding. *See Fair Assessment*, 454 U.S. at 113. On the other hand, if the state court chose not to follow the federal court, inconsistent judgments would exist on an issue so fundamental as whether an individual is wrongly imprisoned. Either result is destructive to the interests of comity that underlie the exhaustion requirement, and indeed form the very foundation of our federal system. Nor should it be forgotten that the precedential value of a § 1983 judgment would be uniquely persuasive in a subsequent federal habeas action. After all, in many instances, the very same federal court that entered the § 1983 judgment would review the habeas petition.

The effects of an initial federal court adjudication of the legality of confinement, moreover, may go beyond the persuasive, precedential and practical. As a legal matter, a state prisoner could in certain circumstances be entitled to use the § 1983 court's damages determination to bind the state in a subsequent action seeking release. On this point, petitioner's analysis of the preclusive effect of a § 1983 judgment is simply incomplete and his conclusion inaccurate.

Petitioner is correct that, as a general matter, a judgment against a state official in his personal capacity will not bind the government in future litigation, because the government was not formally a party to the litigation. But a nonparty, including the government, may be bound by a judgment if it exercises adequate control over the litigation. "'[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record.'" *Montana v. United States*, 440 U.S. 147, 154 (1979) (ellipses and brackets in original) (quoting *Souffront v. Compagnie des Sucreries de Porto Rico*, 217 U.S. 475, 486-87 (1910)). *See also Restatement (Second) of Judgments* § 39 (1982). Notably, the very

treatise on which petitioner relies recognizes not only *Montana's* control principle, but its potential applicability here. "This principle should apply to control of actions brought to assert personal liability against federal officials unless perhaps the circumstances demonstrate that a defense was provided as a personal benefit to the official rather than as a means of protecting the interests of the United States." 18 C. Wright, A. Miller & C. Cooper, *Federal Practice & Procedure* § 4458 at 349 (1993 Supp.).

In a state prisoner's action seeking damages against state officials, the state may have good reason to control the defense. For example, the state may be obligated to indemnify the officials for any judgment against them; the state may be required by statute to provide a defense; or the state may wish to protect against adverse legal precedent that would affect its policies or practices. In many circumstances, therefore, the state may be bound by a § 1983 judgment against state officials in their individual capacities. Adopting petitioner's approach, in short, could allow state prisoners to side-step, even as a legal matter, § 2254(b)'s exhaustion requirement and defeat the comity and federalism interests it serves. *See Deakins v. Monaghan*, 484 U.S. 193, 208 (1988) (White, J., joined by O'Connor, J., concurring) ("A judgment in a federal damages action may decide several questions at issue in a state criminal proceeding."); *Steffel v. Thompson*, 415 U.S. 452, 477 (1974) (White, J., concurring).

We recognize that not all (or possibly even most) prisoner § 1983 claims attacking the legality of a conviction would have preclusive effect on the state.[5] But that fact does not call for the creation of some sort of two-track system for resolving these claims, in which an exhaustion requirement

[5] We do not, of course, concede that the State of Indiana would be bound by a judgment against respondents in this action. Nor do we concede that the presence of any one or more the factors noted above would cause a state to be bound by a judgment.

would apply only to those claims that would have such an effect. Such a system would be utterly infeasible. At the time of filing, a federal court could not distinguish between claims that would bind the state and those that would not. Only after the § 1983 litigation has concluded, and a court could evaluate the degree of the state's control and the reasons for its participation, could any res judicata effects of a judgment be determined. Those inquiries are principally questions of fact. 18 *Federal Practice and Procedure*, *supra* § 4451 at 429. And there would be a whole host of issues to be resolved about the legal consequences of a claim being placed on a particular track. One can imagine an entire new, yet unproductive, jurisprudence being developed to cope with such as system.[6]

Nor it is an answer to suggest that a state may avoid the res judicata effect of a prisoner § 1983 suit merely by refusing to participate in the litigation. That approach would handicap the state when it has legitimate interests to protect in particular litigation. At the same time, that approach could cause tremendous hardship to the individual officers, who often must rely on the state for assistance in litigation of this sort. These results would be precisely the opposite of the comity and federalism policies that govern this area.

All of this points to the need for a bright-line rule. Some actions attacking the legality of a conviction could be used to obtain release from confinement—a result flatly prohibited by the square holding of *Preiser*. Yet the claims that fall in this category cannot be readily identified. Accordingly, all such claims should be subject to § 2254's exhaustion requirement.

[6] We are not aware of any decision in which a prisoner's successful § 1983 damages judgment was accorded preclusive effect in a subsequent suit seeking release. But no doubt that is because the federal courts have uniformly rejected petitioner's theory and have invariably required exhaustion of state remedies for claims such as his. *See infra* at 28 n. 12.

2. The Comity Interests Underlying Section 2254 Are Particularly Strong Where, as Here, A Prisoner Is Attacking a Valid State Court Judgment of Conviction. This Court's rule in *Preiser* requiring exhaustion of all claims challenging the legality of confinement is entirely sufficient to resolve this case. But petitioner's claim—which is an attack not only on his confinement, but also on a valid Indiana conviction—raises comity concerns above and beyond those present in *Preiser*. Thus, when a state judgment of conviction is attacked, exhaustion is even more strongly warranted than for attacks on prison officials' custodial decisions addressed in *Preiser*. For that reason, this case can be decided on a ground narrower than *Preiser*.

Preiser was concerned that a § 1983 action would interfere with future state proceedings. This case involves not just that concern, but also the prospect of interference with an extant state conviction. In its habeas jurisprudence, based on principles of comity, finality and federalism, this Court has always expressed extreme reluctance to disturb state judgments of conviction. *See, e.g., Coleman v. Thompson*, 111 S. Ct. 2546, 2562-65 (1991); *Butler v. McKellar*, 494 U.S. 407, 412-14 (1990); *Wainwright v. Sykes*, 433 U.S. 72, 88 (1977). As this Court has admonished, "[f]ederal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). In sum, the state criminal trial should be the "'main event'. . . rather than a 'tryout on the road'" to the federal habeas court. *Sykes*, 433 U.S. at 90.[7]

At least two other lines of authority reinforce this respect for state court judgments and, beyond that, reflect a

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[7] Thus, *Preiser's* comment that principles of comity have "as much *relevance*" to attacks on state administrative decisions in the prison context as to attacks on convictions, 411 U.S. at 492 (emphasis added), cannot be understood to mean that those principles apply with the *same force* in both contexts.

general principle that a federal § 1983 action cannot be used to review the propriety of state judgments. In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), this Court held that Congress did not intend for state court judgments generally to be subject to collateral attack under § 1983 in a federal district court.

Second, in *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny, this Court has instructed the lower federal courts not to disturb ongoing state proceedings, particularly criminal ones. *See, e.g., Juidice v. Vail*, 430 U.S. 327, 334 (1977); *Samuels v. Mackell*, 401 U.S. 66, 73 (1971). Based on "the notion of 'comity,' that is, a proper respect for state functions," this Court has emphasized that lower courts are to protect federal rights, but should "always endeavor[] to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger*, 401 U.S. at 44. As explained in *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975),

> [i]nterference with a state judicial proceeding prevents the state not only from effectuating its substantive policies, but also from performing the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies. Such interference also results in duplicative legal proceedings, and can readily be interpreted "as reflecting negatively upon the state courts' ability to enforce constitutional principles."

Id. at 604 (quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)). Consistent with these concerns, the Court has broadly defined the concept of an ongoing state proceeding. A § 1983 plaintiff challenging the results of a state proceeding is required to "exhaust his state appellate remedies before seeking relief in the District Court," and—what is critical here—a party cannot avoid the requirement by simply electing

not to pursue those remedies, as petitioner seems to believe. *Id.* at 608, *cf.* Pet. Br. at 7 (noting the fact that certain of his claims were not raised on his criminal appeal). Just as in *Huffman*, this Court should not countenance petitioner's attempt to file this action and short-circuit the State's criminal process.[8]

As discussed previously, to award damages, a federal court would have to determine that petitioner's conviction was improper and his confinement wrongful. But here, a valid state court judgment stands that reflects just the opposite. Conflicting judgments of this sort could not help but create "unnecessary friction between the federal and state court systems." *Preiser*, 411 U.S. at 490. At the very least, a federal court's damages award predicated on a finding of wrongful confinement "could readily be interpreted 'as reflecting negatively upon the state court's ability to enforce constitutional principles.'" *Huffman*, 420 U.S. at 604 (quoting *Steffel*, 415 U.S. at 462). More generally, the existence of inconsistent judgments on an issue so fundamental as whether an individual is wrongfully imprisoned would erode confidence in the judicial system. Indeed, the approach advocated by petitioner could actually

[8] The reasons this Court has held that abstention is inappropriate when state proceedings have yet to begin have no application here. "[W]hile a pending state prosecution provides the federal plaintiff with a concrete opportunity to vindicate his constitutional rights, a refusal on the part of federal courts to intervene when no state proceeding is pending may place the hapless plaintiff between the Scylla of intentionally flouting the law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel*, 415 U.S. at 462. Petitioner obviously had the opportunity to litigate his constitutional claims in the state criminal proceeding that had already been commenced. Moreover, he did not initiate a § 1983 action to avoid the dilemma of either violating the law or foregoing activity he believes is constitutionally protected.

produce three inconsistent judgments: one from the state court, another from the § 1983 court and yet another from a federal habeas court. Indeed, petitioner posits this very hypothetical and apparently sees nothing wrong with it. Pet. Br. at 28-29 & n. 15. No rational legal system, however, can tolerate such a result.

Thus, a federal court should not review the propriety of a state proceeding so long as a state prisoner has elected not to pursue state remedies. *See Huffman*, 420 U.S. at 608. This is the only approach that is consistent with Congress's determination that habeas corpus is the exclusive method for challenging a state court conviction. *See Rooker*, 262 U.S. at 116. Finally, it bears emphasis that state prisoners would readily employ § 1983 to circumvent the procedural requirements of habeas corpus if only given the opportunity. *Cf. Gomez v. United States District Court of the Northern District of California*, 112 S. Ct. 1652 (1992).

B. Limiting the Requested Relief to Damages Provides No Ground for Avoiding Exhaustion.

Notwithstanding the foregoing reasons for exhaustion, petitioner argues that because he has, for the moment, limited the relief he seeks to damages, he may immediately pursue his § 1983 action in federal court. Aside from the fact that such as suit is pressed against the state officials in their individual capacities—a fact that is no more relevant here than in *Fair Assessment*—petitioner relies entirely on the fact his pleading seeks only damages to escape the exhaustion requirement. But reason and precedent demonstrate that the request for relief, standing alone, cannot possibly dictate the need for exhaustion.[9]

[9] Petitioner's reliance on the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997e, is misplaced. According to petitioner, because CRIPA provides a limited exhaustion requirement for certain prisoner § 1983 claims, Congress must have intended that a no-

1. A Request for Damages Based on an Allegedly Illegal Confinement Implicates the Same Comity Concerns As a Request for Habeas Corpus Itself. In *Fair Assessment*, this Court made it unmistakably plain that the request for relief in a § 1983 action does not control the availability of a federal forum. Thus, the Court stressed that the "focus was not on the specific form of relief requested, but on the fact that 'in every practical sense [it] operate[d] to suspend collection of the state taxes until the litigation [was] ended.'" 454 U.S. at 111 (brackets in original) (quoting *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 299 (1943)). On this point, indeed, the majority and concurring opinions were in full agreement. *See id.* at 134-35 (Brennan, J. concurring).

Preiser also rested on this principle. This Court explained that "[i]t would wholly frustrate explicit congressional intent to hold that the respondents in the present case could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleading." 411 U.S. at 489-91. Thus, *Fair Assessment* and *Preiser* both demonstrate what is hardly a remarkable proposition: the practical and legal consequences of an action

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exhaustion rule apply to all other § 1983 claims. Pet. Br. at 12. But this logic leaves no room for the rule announced in *Preiser*, and petitioner does not go so far to suggest that Congress intended to overrule *Preiser*. On the contrary, CRIPA's legislative history contains no mention whatsoever of *Preiser*, thus indicating that Congress did not attempt to change that doctrine. Rather, the legislative history demonstrates Congress believed that adding an exhaustion requirement would reduce the number of state prisoner § 1983 claims. *See Patsy*, 457 U.S. at 508-09. Congress certainly did not believe, as petitioner suggests, that it was eliminating an exhaustion requirement for claims that lie at the core of habeas corpus, and thereby increasing the number of state prisoner § 1983 claims. Notably, Congress has consistently declined to enact legislation containing a no-exhaustion rule for all § 1983 claims. *See id.* at 563 (Powell, J., dissenting) (citing S. 1983, 96th Cong., 1st Sess., § 5 (1979)).

govern the availability of federal relief, not something so formalistic and easily subject to manipulation as the relief requested. *See also Samuels*, 401 U.S. at 73. This principle is only reasonable, for prisoners would have every incentive to engage in such manipulation if allowed to do so. *Cf. Gomez*, 112 S. Ct. at 1652.

As is evident from the discussion above, the fact that petitioner has sought only damages does nothing to alter that he is demanding a "determination that he is entitled to immediate release." *Preiser*, 411 U.S. at 500. Nor does this pleading device avoid the comity concerns animating § 2254(b). Those policies would be seriously compromised if a federal court were to consider his claim on the merits, much less actually grant relief. The state courts would be of deprived of the first opportunity to decide petitioner's constitutional claims; would be prevented from developing the factual record; and would become no more familiar with or hospitable toward federal constitutional claims. Moreover, as a practical matter, and possibly as a legal matter, a federal damages award would pave the way for a state prisoner to secure his release. And since petitioner is directly challenging the lawfulness of his conviction, a federal damages judgment would immediately result in inconsistent judgments on the issue of whether he is properly confined. Contrary to petitioner's assertion, these concerns are neither "intangible" nor "inarticulable." Pet. Br. at 25.

Petitioner is therefore wrong that exhaustion of state remedies is not warranted merely because those remedies cannot provide him with the precise relief he seeks. The nature of his underlying claim makes it impossible to blind oneself to the real stakes. Petitioner contends that he is entitled to damages because he should not be confined, yet insists that he does not want in *this* proceeding to be released. The courts surely must assume, however, that a favorable judgment in this case would inexorably lead to another proceeding in which petitioner does seek his release. It is

wholly unrealistic to view the limited request for relief as anything but a temporary form of self-restraint, designed only to avoid the exhaustion requirement, but not meaningfully to alter what will ultimately be the result.

When a state prisoner attacks the legality of his conviction, as petitioner has done here, there are reasons above an insistence on substance over form why the courts should refuse to honor the prisoner's expressed desire *not* to be released. After all, if a prisoner is actually entitled to damages because he was wrongfully confined, the State itself probably has little motivation to continue to incarcerate that prisoner. Putting to one side the State's moral obligation to release an innocent person, which is certainly powerful, the State obviously would have an economic interest in not consuming its scarce prison resources on an individual who, by hypothesis, should not be confined. Thus, from the State's point of view, as from the prisoner's, it is the substance of the claim, not the relief sought, that matters.

Indeed, petitioner's claimed interest in immediate access to a federal forum for a damages action would, if accepted, create a perverse ranking of relevant interests. Both Congress, in enacting § 2254(b)'s exhaustion requirement, and this Court, in its *Younger* doctrine, have concluded that a state prisoner's interest in avoiding or ending an unconstitutional deprivation of his very freedom is subordinate to considerations of comity that require exhaustion. If such a direct interest in personal liberty is insufficient to overcome the principles of comity underlying the exhaustion requirement, the prisoner's interest in immediate damages deserves even less weight. For several reasons, petitioner's argument turns the obvious hierarchy of constitutional values upside down.

First, prolonged confinement, if improper, causes irreparable harm of the most serious nature. A delay in obtaining damages, by contrast, is in and of itself never

irreparable. A prisoner can always recover additional payments that would fully compensate for any losses caused by a delay in obtaining adjudication of his claim.

Second, not only is there a complete absence of an immediate need for petitioner to obtain the relief he seeks, there is also no particularly compelling need for initial adjudication by a federal court of the underlying claims. The general no-exhaustion rule, this Court has explained, derives principally from the 1871 Reconstruction Congress's view that "the state authorities had been unable or unwilling to protect the constitutional rights of individuals or to punish those who violated these rights." *Patsy*, 456 U.S. at 505. These concerns, however, lose their force when a prisoner is using § 1983 to attack the legality of his conviction. Through the habeas statutes, Congress has long since concluded that state courts not only are adequate, but are the superior forum for initially reviewing claims of that sort. *See, e.g., Brecht v. Abrahamson*, 113 S. Ct. 1710, 1720-21 (1993); *Rose*, 455 U.S. at 518.

Petitioner nevertheless argues that the form rather than substance of a complaint should govern the exhaustion requirement because lower courts are capable of little more than understanding a complaint's form and cannot be expected to recognize when a claim challenges the legality of a conviction. Pet. Br. at 30-31 (citing *Guerro v. Mulhearn*, 498 F.2d 1249, 1254 (1st Cir. 1974)). History soundly defeats this argument, for in the two decades since *Preiser*, the lower courts have experienced no difficulty whatsoever recognizing such challenges. *See infra* at 28, n.12. *See also* M. Schwartz, *The* Preiser *Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DePaul L. Rev. 85, 134-36 (1988) (collecting cases). The concern expressed by the First

Circuit in *Guerro* some twenty years ago has simply never materialized.[10]

2. Neither Wolff v. McDonnell *Nor* Preiser's *Dictum on the Availability of Damages Control Petitioner's Claim.* Petitioner is also wrong when he suggests that *Wolff v. McDonnell*, 418 U.S. 539 (1974) "already has resolved this issue in petitioner's favor." Pet. Br. at 20. First, whatever else may be said of *Wolff*, that decision did not involve an attack on the legality of a valid state court conviction. Quite the opposite, the Court explained that "damages claims * * * could be pressed under § 1983 along with suits challenging the *conditions* of confinement *rather than the fact or duration of custody*." 418 U.S. at 554 (emphasis added). Accordingly, the distinctive comity concerns relating to federal court deference to state *courts* discussed above played no part in *Wolff*.

Second, even on its own terms, *Wolff* is distinguishable. Nothing in *Wolff* suggests that the prisoners were seeking damages to compensate them for the actual loss of good-time credits. The prisoners' damages claim appears to have been intended to compensate them for being subjected to unconstitutional procedures relating to the withdrawal of good-time credits, irrespective of the results of those procedures. As the Court noted, the prisoners were seeking damages "resulting from the *use* of the allegedly unconstitutional procedures." *Id.* at 553 (emphasis added). Petitioner is therefore incorrect that "[t]o prevail in their damages action, the prisoners would have to demonstrate that

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[10] We believe that where a judgment in a § 1983 action would resolve a necessary element to a likely challenge to a conviction, even if the § 1983 court does not determine that the conviction is invalid, the comity interests embodied in § 2254(b) would counsel in favor of exhaustion. In any event, the Court need not resolve that peripheral issue here, because under any standard petitioner is attacking the legality of his conviction.

the withdrawal of their good time was unconstitutional." Pet. Br. at 22. The withdrawal of good time may well have been constitutional, but the procedures employed to effectuate the withdrawal may not have been. *Cf. Haring v. Prosise*, 462 U.S. 306 (1983) (state prisoner who plead guilty may seek damages for illegal search and seizure).[11]

The same is true of the terse footnote in *Gerstein v. Pugh*, 420 U.S. 103, 107 n.6 (1975) from which petitioner draws "strong support." Pet. Br. at 23 n. 11. There, the pre-trial detainees did not complain that they were arrested without probable cause and thus, had they been afforded a hearing, they would have been released from confinement. Rather, the detainees merely sought a hearing, irrespective of its results. 420 U.S. at 106-07.

Nor should this Court's dictum in *Preiser* regarding the availability of a damages claim be given the weight petitioner places on it. Acknowledging that it was unnecessary to its decision, the Court briefly commented that

> [i]f a state prisoner is seeking damages, he is attacking something other than the fact or length of confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, * * * a damages action by a state prisoner could be brought under the Civil Rights

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[11] Furthermore, it is unclear whether damages could have been recovered by the prisoners in *Wolff*, given this Court's decision not to apply its holding retroactively. 418 U.S. at 573-74. This Court would not likely have contemplated that the prisoners could recover damages for conduct that, at the time it occurred, was not illegal. *Cf. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, *Wolff*'s comments regarding the cognizability of a damages action may be fairly characterized as dictum.

> Act in federal court without any requirement of prior exhaustion of state remedies.

411 U.S. at 494 (emphasis in original). By its own terms, this dictum is limited to situations where, *unlike* here, a state prisoner is "attacking something other than the fact * * * of confinement." While claims seeking damages may *generally* fall in this category, *cf. Haring, supra*, petitioner's here do not. In short, the Court could not have been contemplating claims such as petitioner's. Not surprisingly, over the past two decades since *Preiser*, the lower federal courts have uniformly rejected petitioner's reading of this dictum and his argument generally.[12]

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE APPROPRIATE REMEDY IS DISMISSAL WITHOUT PREJUDICE.

This Court has held time and again that a habeas corpus petition containing claims for which state remedies have not been exhausted should be dismissed. Indeed, the Court has expressly rejected the notion that such a claim should be held

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[12] *See, e.g., Tedford v. Hepting*, 990 F.2d 745, 748-49 (3d Cir.), *cert. denied*, 114 S. Ct. 317 (1993); *Scruggs v. Moellering*, 870 F.2d 376, 378-79 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989); *Williams v. Hepting*, 844 F.2d 138, 143-44 (3d Cir.), *cert. denied*, 488 U.S. 851 (1988); *Spina v. Aaron*, 821 F.2d 1126, 1127-28 (5th Cir. 1987); *Feeney v. Auger*, 808 F.2d 1279, 1281 (8th Cir. 1986); *Leonard v. Hammond*, 804 F.2d 838, 840 (4th Cir. 1986); *Monk v. Secretary of Navy*, 793 F.2d 364, 366-68 (D.C. Cir. 1986); *Hadley v. Werner*, 753 F.2d 514, 516 (6th Cir. 1985) (per curiam); *Caldwell v. Line*, 679 F.2d 494, 496 (5th Cir. 1982); *Richardson v. Fleming*, 651 F.2d 366, 372-73 (5th Cir. 1981); *Franklin v. Webb*, 653 F.2d 362, 363-64 (8th Cir. 1981); *Hamlin v. Warren*, 664 F.2d 29, 30-32 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982); *Parkhurst v. State of Wyoming*, 641 F.2d 775, 777 (10th Cir. 1981) (per curiam); *Meadows v. Evans*, 550 F.2d 345, 349 (5th Cir.) (en banc) (*aff'd per curiam*, 529 F.2d 385 (5th Cir. 1976)), *cert. denied*, 434 U.S. 969 (1977); *Fulford v. Klein*, 529 F.2d 377, 381 (5th Cir. 1976); *Guerro v. Mulhearn*, 498 F.2d 1249, 1252-53 (1st Cir. 1974); *accord Martin v. Merola*, 532 F.2d 191, 194 (2d Cir. 1976).

on the district court's docket pending exhaustion of state remedies. Moreover, intensely practical considerations support precisely such a rule in cases such as petitioner's.

Nor do concerns petitioner raises about the appropriate application of the statute of limitations counsel a different rule here. First, state limitations law and coordinate tolling rules provide adequate protection against unfairly "barring the courthouse door" to meritorious claims. Second, even if state law did not, the court of appeals was entirely correct that federal law would provide ample protection. Speculative concerns about the results of a limitations inquiry that, in all likelihood, will never take place, are an extremely poor foundation on which to base a rule dealing with claims such as petitioner's.

A. This Court Has Consistently Held that Unexhausted Habeas Claims Should be Dismissed, Not Stayed.

When a habeas corpus petition contains unexhausted claims, this Court has consistently held that the proper remedy is dismissal, not a stay. The Court expressly considered and rejected the stay alternative in *Slayton v. Smith*, 404 U.S. 53 (1971). There, the Fourth Circuit had instructed the district court to stay the proceedings while the petitioner sought relief in the state courts. This court rejected such a procedure in plain and unequivocal terms and held that "absent special circumstances, rather than ordering retention of the case on the District Court's docket, the Court of Appeals should simply have vacated the judgment of the lower court and directed dismissal of the petition for failure to exhaust state remedies." 404 U.S. at 54 (citations omitted).

Since *Slayton*, this Court has repeatedly directed dismissal where the petitioner had not complied with the exhaustion requirement. Thus, the Court held in *Duckworth v. Serrano*, 454 U.S. 1 (1981), that "the Court of Appeals was obligated *to dismiss* respondent's petition." 454 U.S. at

4 (emphasis added). Similarly in *Rose v. Lundy*, 455 U.S. 509 (1982), a case dealing with "mixed" petitions that included both exhausted and unexhausted claims, the Court could not have been more clear about the required remedy: "we hold that a district court *must dismiss* habeas petitions containing both unexhausted and exhausted claims." 455 U.S. at 522. And outside the habeas context, this Court has found dismissal warranted for § 1983 actions that would impermissibly intrude on state proceedings. *See Fair Assessment*, 454 U.S. at 117; *cf. Huffman*, 420 U.S. at 611 (district court "should not have entertained" action absent applicability of an exception to *Younger*).

The same result should apply here. For the reasons set forth in part I, *supra*, a suit challenging the lawfulness of conviction and confinement fully implicates the comity principles underlying the exhaustion requirement of § 2254, and its ultimate and practical effect would be to achieve an end-run around § 2254. Accordingly, such an action should be treated just as would a § 2254 petition, and if it contains unexhausted claims, it should be dismissed. As this Court noted in *Preiser*, "[i]t would wholly frustrate explicit congressional intent [behind the exhaustion requirement] to hold that the respondents in the present case could evade this requirement by the simple expedient of putting a different label on their pleadings." 411 U.S. at 489-90. In such a circumstance, "exhaustion of adequate state remedies [is] a condition precedent to the invocation of federal judicial relief. . . ." *Id.* at 490. Accordingly, the appropriate remedy is dismissal, not a stay.[13]

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[13] Nor is *Deakins v. Monoghan*, 484 U.S. 193 (1988), to the contrary. Unlike here, *Deakins* did not involve claims that lay at core of habeas corpus. The plaintiffs in *Deakins* had not been convicted by a state court and were apparently not even in custody. *See* 484 U.S. at 196-99. Indeed, *Deakins* did not even mention *Preiser*, and the concern that congressionally imposed limitations on habeas corpus not be circumvented. Even on its own terms, *Deakins* recognized that dismissal might be appropriate "where the order to the parties to repair to the State court would clearly serve an important countervailing interest." 484 U.S. at 203 (multiple citations and internal quotation marks omitted). It is difficult to imagine a more "important countervailing interest" than federal noninterference with the state criminal process mandated by § 2254(b).

B. Practical Considerations Counsel Against the Rule Suggested by Petitioner

Apart from the fact that dismissal is plainly the remedy specified by prior case law, that remedy is also supported by sound practical considerations. Petitioner's premise that the rule adopted by the court of appeals will result in the dismissal of meritorious § 1983 claims is fundamentally flawed. The vast majority of claims such as those alleged in petitioner's action will ultimately require dismissal in any event, for a variety of reasons. Moreover, both state law concerning limitations generally, and federal law concerning statutes of limitations applicable to § 1983 actions are more than adequate to preserve those few that may be ultimately found to have merit. Petitioner's request that this Court adopt a rule that would require the retention of thousands of frivolous actions on the dockets of the federal district courts in order to protect a mere handful of meritorious ones that are adequately protected anyway is therefore unwarranted.

1. The Vast Majority of Claims Such As Petitioner's Will Ultimately Be Found Without Merit. To decide whether the rule petitioner urges should be adopted, the Court should first consider how likely it is that the reason he advances for it—the danger of barring *meritorious* suits—will actually occur. Any such consideration must begin with the recognition that the vast majority of attacks on the legality of state convictions are found so meritless that a hearing is not even required. For example, of the 10,087 habeas corpus petitions that were filed in the year ending June 30, 1989,

1,403 were disposed of with no court action at all, and another 8,457 were disposed of before any sort of pretrial hearing was held. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 208 (1989). Another 89 were disposed of during or after a pretrial hearing. *Id.* Thus, only 138, or 1.4% reached trial. *Id.* Fewer still, it must be assumed, actually resulted in any relief.[14] Because the legality of petitioner's conviction is already firmly established against him, and because the illegality of his conviction is an essential element of his § 1983 action, unless he can make out a claim sufficient for *habeas corpus* relief, the conviction itself will stand as an insuperable bar to any relief under § 1983. *Allen v. McCurry, supra.*[15]

While this alone counsels against holding actions such as petitioner's on the district court dockets for years, there are additional obstacles that would bar a § 1983 action even if habeas relief is successfully obtained. For example, petitioner cannot sue either the State itself, or State officials in their official capacities both because they are not "persons" within the meaning of § 1983 and because the 11th Amendment would bar any such suit. *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).

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[14] For prisoner § 1983 actions, figures are similar, though a slightly larger proportion of the 24,231 such cases, 4.2%, actually reached trial. *Id.* These actions, of course, also include suits challenging conditions of confinement, which are somewhat more likely to result in relief.

[15] Respondents recognize that, ultimately, this inquiry turns on relevant state-law preclusion principles. However, petitioner himself recognizes that "most" states would apply an estoppel in such circumstances and that "virtually all" prisoners are potentially subject to such a rule. Pet Br. at 29, n. 15. In fact, it is difficult to imagine that *any* State would hold a prisoner was validly convicted, yet award him damages for his confinement.

Moreover, even in their individual capacities, some defendants, such as defendants Humphrey and Ewbank, will in all likelihood enjoy absolute immunity for most, if not all of petitioner's claims. *Imbler v. Pactman*, 424 U.S. 409 (1976). Indeed, given the vagueness of petitioner's other allegations, he may be seeking to hold even the non-prosecutor defendants liable for acts within the scope of absolute immunity. *Cf. Briscoe v. LaHue*, 460 U.S. 325 (1983) (witness absolutely immune for testimony given in a judicial proceeding).[16]

---

[16] While petitioner's complaint is artfully drawn to allege that "Both the defendants Humphrey and Ewbank, even though County Prosecutors at said time, were acting as 'police investigators', and not functioning in their quasi-judicial capacities against the plaintiff," Pet App 23a, it is far from clear these conclusory allegations can withstand scrutiny. For example, to the extent petitioner was harmed by the supposedly suggestive voice identification procedure, the harm he complains of (his conviction, though allegedly innocent), plainly flowed from the victim's *in-court* identification testimony, and it is clear that the prosecutors enjoyed absolute immunity in presenting that testimony. *Imbler*, 424 U.S. at 431 (absolute immunity applies to prosecutor's conduct "in presenting the State's case"). Indeed, absolute immunity most likely applies even to the prior out of court identifications. *Id.* at 430 (out of court "effort to control the presentation of witness' testimony" entitled to absolute immunity); *see also Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2615 (1993) (rejecting argument that absolute immunity applies only to "the act of initiation itself and to conduct occurring in the courtroom" as an "extreme position . . . plainly foreclosed by our opinion in *Imbler* itself."). Moreover, petitioner's allegations that defendants "took items from [the decedent's] relatives and used them in their unlawful, unreasonable, and arbitrary investigation of [petitioner]" may be nothing more than an allegation that the items referred to were introduced in evidence against petitioner, again an act to which absolute immunity attaches. *Briscoe, supra.* This seems particularly likely given that petitioner has expressly limited his allegations to the time period "between May and July 1987," a period long after the "investigation" was complete.

Indeed, it is difficult to imagine how allegations like petitioner's, which directly attack the legality of his conviction, could fall outside the scope of absolute immunity, yet still state a claim for relief under § 1983. *See Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2620 (1993) (Scalia, J., concurring) ("If 'reframe[d] . . . to attack the preparation' of that evidence, the claims are unlikely to be cognizable under § 1983, since petitioner cites, and I am aware of, no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution."). *Cf. Albright v. Oliver*, 114 S. Ct. 807 (1994) (claim that a party was prosecuted without probable cause did not state a claim for deprivation of liberty without due process).[17]

Moreover, even for acts not falling within the scope of absolute immunity, yet still violating the criminal defendant's constitutional rights (if any such acts are possible in this case), qualified immunity may well be available unless the defendants violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *E.g. Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Buckley*, 113 S. Ct. at 2613.[18] This standard is particularly

[17] Some of the opinions in *Albright* noted that the petitioner might have stated a claim for an unlawful arrest under the Fourth Amendment, but the Court declined to decide the issue because it was not urged in either the petition for writ of certiorari or the petitioner's briefs. *See* 114 S. Ct. at 812 & n. 5 (plurality opinion of Rehnquist, C.J.); *id.* at 814-15 (separate opinion of Ginsburg, J.); *id.* at 821 (separate opinion of Souter, J.). Petitioner here, however, has alleged no unlawful arrest, nor has he alleged an unlawful search. *See supra* at 4.

[18] While petitioner has, again, attempted to craft his complaint to anticipate a qualified immunity defense, Complaint ¶ 5, it is far from clear the allegations will withstand scrutiny. For example, petitioner has identified no case establishing that the voice identification procedure

unlikely to be met if the conduct alleged by the prisoner has been considered on direct review of his State conviction and found to be lawful, (as petitioner's claim of improperly suggestive voice identification was).[19] State courts, no less than federal courts, are bound to faithfully interpret and apply federal constitutional principles in reviewing judgments of conviction. Indeed, state courts have *primary* responsibility for doing so in the context of the criminal law.

In sum, the likelihood of a claim such as petitioner's purported § 1983 claim actually forming the basis of § 1983 relief is extremely small. It simply makes no sense for this Court to adopt a general rule requiring the district courts to hold thousands of dormant cases on their dockets in order to protect the tiny number of cases that ultimately might lead to relief. This is particularly true because existing case law already provides adequate protection for those few claims that have merit, as shown below.

2. *Existing Case Law Adequately Protects Those Few Claims That Are Meritorious.* A second reason petitioner's proposed rule should be rejected is that there is no danger that those few claims which ultimately prove meritorious will be unfairly barred by the statute of limitations—the sole reason petitioner, and the authorities cited by him, give for the adoption of the rule he advocates. State tolling rules plainly provide relief from the statute of limitations to the diligent plaintiff forced to delay bringing his claim while he exhausts state remedies. And even if they did not, federal law would do so.

used in his case was illegal at all, much less a case "clearly establishing" that it was illegal.

[19] Indeed, the claim was also rejected by both the district court, J.A. 55-56, and the Seventh Circuit on habeas review found the error, if any, "harmless beyond a reasonable doubt." J.A. 62. This Court denied certiorari. *Heck v. Richards*, 113 S. Ct. 1308 (1993)

Indiana law provides that where a plaintiff must complete one judicial proceeding before he can commence another, the statute of limitations on the latter does not begin to run until the former is complete. *State ex rel. Pink v. Cockley*, 110 Ind. App. 417, 37 N.E.2d 284, 288 (1941) ("We think that the rule in this state is well settled that where a litigant is prevented from enforcing his remedy during the pendency of legal proceedings, the time during which he is thus prevented will not be counted against him in determining whether a statute of limitations has barred his action."); *see also City of Fort Wayne v. Hamilton*, 132 Ind. 487, 32 N.E. 324, 327 (1892); *Commercial Credit Corp. v. Ensley*, 148 Ind. App. 151, 264 N.E.2d 80, 86 (1970). Indeed, this rule is apparently followed in substantially all American jurisdictions. *See* 54 C.J.S. *Limitation of Actions*, §§ 121-22; 93-94 (1987); 51 AM. JUR. 2D *Limitation of Actions* § 170.

That, of course, is precisely the same situation that confronts a plaintiff with a claim such as petitioner's when he must first exhaust his state remedies before proceeding in federal court.[20]

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[20] This is not to suggest that petitioner's claim *in this case* is automatically saved from the statute of limitations. For Indiana law, while excusing the time necessarily consumed in satisfying conditions precedent to suit, still requires plaintiffs to proceed with dispatch. In other words "A person who has it in his power to make his cause of action complete must do so within a reasonable time, and the statute of limitations will not await the pleasure or convenience of the plaintiff." *Scates v. State*, 178 Ind. App. 624, 383 N.E.2d 491, 493 (1978); *see also Krafft v. Thomas*, 123 Ind. 513, 24 N.E. 346, 346-47 (1890) (where demand is a prerequisite to suit, demand must be made within a reasonable time because "[i]f the rule was otherwise, a party, by his own act or failure to act, could preclude the running of the statute of limitations until such time as might suit his interest, convenience, or pleasure to put it in motion.") Here, even after the district court told petitioner he must exhaust his state remedies on February 1, 1989 (well within the statute of limitations if, as petitioner alleges, the alleged misconduct took place "between May and July, 1987" Pet. App. 23a), he

However, even if Indiana law would not provide the diligent plaintiff with relief from the statute of limitations, it is clear that federal law would provide a remedy where necessary. While petitioner recognizes that state statutes of limitations and tolling rules may not be applied to § 1983 claims "when their use 'would defeat the goals of the federal statute,'" Pet. Br. at 38-39 n. 23 (quoting *Hardin v. Straub*, 490 U.S. 536, 539 (1989)), he fails to recognize the significance of that admonition for cases where exhaustion is required as a matter of federal law. There is little, if any, doubt that neither this Court nor any other would countenance a time-bar of a *truly* meritorious § 1983 suit where it could not previously have been brought because the plaintiff was first required to exhaust state remedies. Indeed, as one of the cases relied upon by petitioner bluntly states, "it would hardly promote the goals of the Civil Right Act of 1871 to twice deny prisoners a federal forum for § 1983 complaints, once for being too early and again for being too late." *Young v. Kenny*, 907 F.2d 874, 878 (9th Cir. 1990).

Such a situation would not, as petitioner suggests, be a case where a state statute "merely . . . causes the plaintiff to lose the litigation," Pet. Br. at 39 n. 23 (quoting *Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980)), but one where the plaintiff would be deprived of *any* opportunity to even have the claim *considered*, no matter how diligent he was. As shown above, state law does not lead to such a result. But if it did, the federal courts have full power to provide relief.[21]

---

still has refused to present his claims to the state courts. *See* Pet. Br. at 7 & n.2 (conceding that he still has not exhausted any of his claims other than that pertaining to the allegedly illegal voice identification procedure, which both the district court and the Seventh Circuit rejected on habeas corpus review).

[21] Given the small likelihood that a federal court would actually be called upon to fashion an equitable tolling doctrine to govern such

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

PAMELA CARTER
Attorney General of Indiana

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(*Counsel of Record)

April 1994

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claims, respondents agree with petitioner that the court of appeals' detailed discussion of the probable contours of any such doctrine was unnecessary, and express no opinion on whether those contours were accurately described.

Appendix

Motion To Correct Errors
[filed October 16, 1987] ..... App. 2

Order Denying Motion To Correct Errors
[November 25, 1987] ..... App. 3

Petition For Dissolution Of Marriage
[Filed October 22, 1985] ..... App. 4

Motion For Provisional Orders
[Filed October 22, 1985] ..... App. 6

Provisional Orders
[October 22, 1985] ..... App. 7

Excerpts of Testimony From Petitioner's Criminal Trial ... App. 8

State of Indiana) In The Dearborn Circuit Court
) SS:
County of Dearborn) General Term, 1987

State Of Indiana)
)
vs.)
) Cause No. 9764
Roy Heck, Sr.)

MOTION TO CORRECT ERRORS
[filed October 16, 1987]

The defendant, Roy Heck, Sr., requests the Court to correct error for the following reasons:

* * *

2. The judgment of conviction is contrary to the evidence in the following respects:

* * *

kk. the Court erred and was abusive of its discretion by permitting the State of Indiana to present evidence during its case in chief by the direct examination of Police Officers Lyman Connoly and Michael Kreinhop concerning the search and discovery of the body of Rickie Heck for the reason that the same was a result of a search conducted by an illegal search warrant;

* * *

WHEREFORE, defendant prays that the court alter the judgment herein and enter a Verdict of Not Guilty, order a new trial, or any other proper relief.

VOTOW & DORNETTE

John J. Dornette /s/

John J. Dornette
Attorney for Defendant
Roy E. Heck, Sr.

R. I at 1 - 10

State of Indiana) In The Dearborn Circuit Court
) SS:
County of Dearborn) General Term, 1987

State Of Indiana)
)
vs.)
) Cause No. 9764
Roy Heck, Sr.)

ORDER DENYING MOTION
[November 25, 1987]

Comes now the defendant, Roy Heck, Sr., by Counsel, Joseph W. Votaw and J. Jeffrey Dornette, and having heretofore filed his Motion To Correct Errors, which Motion is in the words and figures as follows, to wit: (H.I.)

And the Court having examined said Motion and being duly and sufficiently advised in the premises, now finds that defendant's Motion to Correct Errors should be denied.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THE COURT: That defendant's Motion To Correct Errors be and the same hereby is denied.

Dated this 25th day of November, 1987.

Anthony C. Meyer /s/

Anthony C. Meyer, Judge
Seventh Judicial Circuit

cc: Prosecutor
Votaw

R. III at 511

State of Indiana) In The Dearborn Circuit Court
) SS:
County of Dearborn) General Term, 1985

In re: The Marriage of Rickie)
) Cause No. 25021
Lynn Heck and Roy E. Heck)

PETITION FOR DISSOLUTION OF MARRIAGE
[Filed October 22, 1985]

Comes now the petitioner, Rickie Lynn Heck, and being first duly sworn upon her oath, and for petition for dissolution of marriage, says:

1. That she has been a resident of the State of Indiana for more than six (6) months last past and a resident of the County of Dearborn for more than three (3) months immediately preceding the filing of this petition;

2. That the parties were married on the 4th day of April, 1964 and lived together as husband and wife but have since separated on or about the 30th day of August, 1985;

3. That three (3) children were born as a result of this marriage, namely: Roy Heck, Jr., age 20, Roberta L. Heck, age 18, who are both now emancipated, and Joseph E. Heck, age 15; and that this petitioner, is the fit and proper person to have the care, custody and control of said minor child subject to reasonable visitation by respondent;

4. That petitioner is not now pregnant;

5. That an irretrievable breakdown has occurred in the marriage;

6. That certain property has been accumulated during the course of the marriage which should be adjusted by the Court.

WHEREFORE, petitioner prays that the marriage referred to herein be dissolved; that the petitioner be awarded the care, custody and control of the minor child of the parties, subject to reasonable

visitation by the respondent; that the Court make a determination concerning the support of the minor child herein; that the Court make an equitable division of the properties accumulated during the course of the marriage; for her attorney fees; and all other just and proper relief in the premises.

Rickie Lynn Heck /s/
Rickie Lynn Heck

[JURAT OMITTED]

R. VIII at 2035-1 - 2035-2 (States Ex. 101)

State of Indiana)
) SS:
County of Dearborn)

In The Dearborn Circuit Court

General Term, 1985

In re: The Marriage of Rickie)
)
Lynn Heck and Roy E. Heck)

Cause No. 25021

MOTION FOR PROVISIONAL ORDERS
[Filed October 22, 1985]

Comes now the petitioner, Rickie Lynn Heck, and being first duly sworn upon her oath, deposes and says:

* * *

7. That your petitioner has reason to believe that said respondent is possessed of a violent and dangerous temperament and that he should be restrained from harassing or bothering the petitioner at any time or any place during the pendency of this proceeding;

* * *

WHEREFORE, your petitioner prays from an immediate restraining order . . . restraining the respondent from harassing or bothering the petitioner at any time or any place. . . and all other relief proper in the premises.

Rickie Lynn Heck /s/

Rickie Lynn Heck

[JURAT OMITTED]

R. VIII at 2035-3 - 2035-4 (States Ex. 101)

State of Indiana)
) SS:
County of Dearborn)

In The Dearborn Circuit Court

General Term, 1985

In re: The Marriage of Rickie)
)
Lynn Heck and Roy E. Heck)

Cause No. 25021

PROVISIONAL ORDERS
[October 22, 1985]

Comes now the petitioner, Rickie Lynn Heck, and having heretofore filed her duly verified motion for provisional orders, which motion is in the words and figures following, to-wit:

(H.I.)

And the Court having examined said motion and being duly advised in the premises now finds that the prayer thereof should be granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that . . .Roy E. Heck be and he hereby is restrained from harassing or molesting Rickie Lynn Heck at any time or any place.

All of which is ordered this 22 day of October, 1985.

Anthony C. Meyer /s/

Anthony C. Meyer, Judge
Dearborn Circuit Court

R. VIII at 2035-5 - 2035-6 (States Ex. 101)

Excerpts of Testimony From Petitioner's Criminal Trial

THOMAS G. BAUER, BEING FIRST DULY SWORN AND UPON HIS OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY ROBERT J. EWBANK, SPECIAL PROSECUTING ATTORNEY.

Q. Officer, state your name for the record, please.

A. Thomas G. Bauer.

• • •

Q. And, what is your occupation?

A. Lieutenant with the Dearborn County Police Department.

• • •

Q. Okay. Officer, I'll call your attention to the 3rd day of November, 1985, at that time did you receive a report of battery from Rickie Heck?

A. I did.

• • •

Q. Okay. At the time Rickie Heck . . . did Rickie Heck come to the police department?

A. Yes.

Q. Okay. At the time Rickie Heck came to the police department, did you notice any bruising or other things about her presence?

A. Yes, she had marks.

Q. Okay. Would you describe those marks to the jury?

A. She had marks on her throat.

Q. Okay. Any other marks?

A. Not that I remember.

• • •

Q. Officer, did she make any requests of you at that time?

A. Yes, she requested police protection.

• • •

Q. Now, Officer, after she requested police protection, did she explain to you why she wanted police protection?

A. Yes, she did.

Q. What did she tell you?

A. She said her husband was going to kill her.

Q. Officer, did she indicate any fear about even making the report to you?

A. Yes.

Q. What did she tell you?

A. She was afraid that there would be retaliation, because of the report.

Q. Officer, as to these bruises that you noticed on her neck, did she indicate who had done that to her?

A. Yes, she did.

Q. And, who was that?

A. Her husband.

Q. And, is that Roy Heck, Sr.?

A. Yes.

R. VI, 1286-91.

MARILYN CHRISMAN, BEING FIRST DULY SWORN AND UPON HER OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION ON REBUTTAL BY JAMES D. HUMPHREY, PROSECUTING ATTORNEY.

• • •

Q Ms Chrisman, I'm going to direct your attention to on or about September, 1984. Did you have occasion, in that time period, to see Rickie Heck and Roberta Heck?

A Yes.

Q And, what were the circumstances of this meeting?

A Well, they both came to my home late one evening, ah, and Rick's face was all swollen and she had knots on the back of her head, . . .

• • •

Q After you observed these injuries, did you discuss them with Rickie?

A Yes, I did.

Q And, what did she tell you about them.

[Objection made and overruled]

Q You may answer.

A The had been someplace, I'm not sure where, she said there was road blocks. . . I guess she meant like, barricades or something in the road, ah, I don't remember everything, but there was a girlfriend involved there someplace, of Roy's, and Bobbi and Rick and Roy were in the red truck or in the truck, I assumed it was the red one, ah, and, I don't [know] how, an argument started, but one was. . . Roy became angry and he had taken his hand, like this (indicating), while he was driving, and he started hitting her head against the back window of the truck, and was squeezing her face, and her face became all bruised, and that's how she got the places on the back of her head. So, Bobbi finally got Rick out of the truck, ah, and she was driving a little red car at that time, and

she brought Rick out home and we had to put cold cloths on her face . . .

R. VIII, 1940-47.

ROY HECK JUNIOR, BEING FIRST DULY SWORN AND UPON HIS OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY JAMES D. HUMPHREY, PROSECUTING ATTORNEY.

• • •

Q. Mr. Heck, are you the son of the defendant?

A. Yes, I am.

Q. And, were you also the son of Rickie Heck?

A. Yes, I am.

• • •

Q. Mr. Heck, would you describe to the jury what life was like between your mother and your father while they were together?

A. It was good, in the earlier stages, but as things progressed, it got worse. It got violent.

Q. And, when did this begin?

A. When I was about fifteen, about seven years ago.

Q. Mr. Heck, did you ever observe any physical violence between your mother and father?

A. Yes, Sir.

Q. Would you tell the jury about it?

A. A couple of years ago, I was standing in the kitchen looking out the window and my mother and father was having a fight and mom said she wanted to go to her mom's, to grandma Burton's and when she tried to get in the car, dad slammed the car door on her several times.

Q. Now, Mr. Heck, are you aware of any other. . . did you ever observe any other violence between your mother and father?

A. I can't remember the exact date, but one time around the end of 1985, he come to our. . . mine and my wife's trailer while my mother was staying there and kind of threw mom around quite a bit.

• • •

Q. Now, that incident, were your mother and father living together at that time?

A. No, Sir.

Q. Did there come a time when they separated?

A. Yes, Sir, about August of '85.

Q. Now, the incident that you just mentioned taking place at the trailer park, that was after the separation, is that correct?

A. Yes, Sir.

Q. And, would you tell the jury what you saw happen that night?

A. Me and my wife was asleep in the front bedroom, my mother was sleeping in the back bedroom and I guess it was about two o'clock in the morning or so, my wife woke me up and said she heard shattering glass. So, I got up and walked to the front door and there was a hand reaching inside unlocking the front door. The time I got there, my father was stepping in. I don't remember exactly all that happened from then on, cause it went so fast, but mom had heard him come in. He was yelling at me. I stepped back. She run in. I stepped back into the bedroom to tell my wife what was going on, I believe, and she followed me back in. They was having words.

Q. Now, by they, who do you mean?

A. My parents. Mom and dad.

Q. Was your mother living with you at that time?

A. Yes.

Q. What happened next?

A. I. . . we both stepped back out and my wife went to the bathroom, she was scared. I went in and couldn't find nothing. Dad was really wild acting, so, I looked for something to use to get him out. All I could find was a little broom. I stepped back in and seen him throwing her against the couch, just kind of harassing her, more or less. I stepped back out. The whole time, she was yelling for him to leave and when I come back, he had left.

• • •

Q When was the last time you saw your mother?

A Saturday afternoon, I guess it would have been January 5th, been Saturday.

Q Would this be the Saturday before your mother disappeared?

A Yes, Sir.

Q So, would that have been Saturday, January 4th?

A Fourth, yes, yes.

• • •

Q Mr. Heck, I'm going to direct your attention to Sunday, January 5, 1986, the next day. What do you recall happening on that day?

A Well, toward the evening, I received a phone call from my father, I'd say about nine to nine thirty and he said that my mother was going to be taking a trip and that she wanted me to take care of her car while she was gone and just to inform me that she would be leaving.

• • •

Q What else did your father tell you at this time?

A He told me that he would pick me up at five o'clock the following morning to get her car. He said he'd pick me up and he'd just take me up there and I could drive it to work.

Q And, where did he say you were going to?

A My mother's trailer.

• • •

Q What happened after that?

A Well, I received a call about five o'clock the next morning stating that he was on his way, he'd pick me up. . .

Q Was this call from you father also?

A Yes. And, dad picked me up about five-thirty Monday morning and we drove to Lawrenceburg and got the car.

• • •

Q On the way to your mother's trailer, was there any conversation between you and your father?

A Just small, nothing major. He was extremely high strung, but I just kept talking with him, you know, I thought he . . . maybe had had been out drinking.

Q What happened after that?

A We got to mom's trailer court and the keys was . . . he said that mom said that she would leave the keys laying outside the door underneath the step and they were there.

Q Is that what your father said?

A Yes.

Q For clarification, this is Monday morning?

A Yes, yes.

Q What happened then?

A We. . . he picked up the keys and . . .

Q Did he, excuse me, did he seem to have any trouble finding where the keys were?

A No, Sir. No, he just went straight to them.

Q Where were they located?

A Up against the trailer and there were some stone steps that come to it, they were in the corner, wedged down in there.

Q What happened then?

A We went in the trailer. We just stepped in to look at things. I turned the light off that was over the sink. One thing that kind of caught my eye while I was in there, when I was walking toward the light was, there was a skillet containing sliced up potatoes, fried potatoes, that hadn't been touched, they'd been cooked, they was partially cooked sitting in grease and there was a full pot of coffee on the stove, both of them cold, turned off, but they had been untouched.

• • •

Q: Prior to leaving the trailer, did you notice anything else out of place unusual?

A: The trailer was in a general mess. There was a plant turned over and there was like a . . . mom had a plastic clothes rack she dried clothes inside the trailer on, it was all turned over and chairs turned over. It was a mess.

Q: Is that unusual?

A: For my mother, yes. She was extremely clean.

Q: Prior to your . . . you and your father leaving that morning, did you have any further conversation?

A: Just about the meeting at seven o'clock that evening.

Q: You arranged to meet there that night?

A: Yes.

Q: Did he tell you anything else?

A: Just to pick up mom's check at Marathon Restaurant.

Q: Well, what happened later that evening?

A: I come down to meet him at seven and he wasn't there yet, so, I drove up to Marathon and they would not give me her check.

• • •

Q: Well, what happened after that?

A: I drove back to the trailer and he arrived shortly thereafter.

Q: And, did you meet with your father at that location?

A: Yes, We went in the trailer. He was concerned about thefts while mom was gone, is what he told me. He said we aught to remove all the valuable items. So, he took the T.V. and some food out of the refrigerator and a carton of cigarettes. I believe that was all.

• • •

Q: At this time, did you (STRIKE THAT). Did you observe anything else, at this time, that you didn't observe the first time you were there?

A: Yes, come to think of it, I believe it was that time that I went in and I found that the drawers and that was open on her closets. It was that evening.

• • •

Q: Directing your attention to Tuesday, this being January 5th, did anything unusual happen on that day?

A: I received a phone call from my Aunt Marilyn directly after work, I believe it was, . . .

• • •

Q: What did Marilyn tell you at this time?

A: She ask me to go to the trailer and look around a little better to see if I'd overlooked anything cause we didn't know what had happened. . .

[Objection made and overruled]

Q: After being requested to do this, what did you do?

A: Well, after I got done talking to Marilyn, I went to my father's farm and ask him for the keys to the trailer.

• • •

Q: And, when you arrived at the farm, was your father there?

A: Yes, he was. He. . .

Q: And, did you notice anything unusual about his appearance or the was he was acting at that time?

A: When we pulled up, we pulled up to the farm and parked right in front of the barn and I got out of the truck and just as soon as I stepped out, here come dad running toward me. I told my wife, I said, stay in the truck, somethings odd and I met him and I told him what I wanted was the keys. He turned around and ran into the house and got them and met me in the yard with them. Which was unusual for him to run.

Q: Did you ever get inside the house at that time?

A: No, Sir.

• • •

Q Did it appear to you, based upon your observations, that you were going to be permitted to go in the house?

A No, Sir. No, Sir.

Q Did you get the keys to the trailer?

A Yes, Sir.

Q And, what did you do after receiving the keys?

A Me and my wife, Chris, drove down to the trailer and we looked around the best we could. Didn't really find nothing out of the ordinary at that time.

Q Did you see anything different then you had seen before? If you recall.

A Yes, yes, Sir. My flashlight was on the bed, where it hadn't been the day before.

Q Where had this flashlight been?

A Right around Christmas time, my mother had some trouble with her car and me and my father worked on it and he ended up with my flashlight that night.

• • •

Q What happened after that?

A I took my wife home and went to return the key to the farm.

Q And, when you got back to [the] farm, what did you do?

A Well, I got there and dad wasn't home at the time, so, I went on in and put the key on top of the T.V. for him and when I was leaving I noticed one of mom's suitcases laying on the stairway to the upstairs of the farm.

• • •

Q Mr. Heck, did it appear to you [at the scene of your mother's trailer] that there had been some type of struggle?

[Objection made and overruled]

A Yes, Sir.

R III, 681-701

ROBERTA HECK, BEING FIRST DULY SWORN AND UPON HER OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY JAMES D. HUMPHREY, PROSECUTING ATTORNEY.

• • •

Q And, Ms. Heck, are you the daughter of Rickie Heck?

A Yes, I am.

Q And, Roy Heck?

A Yes, I am.

• • •

Q Directing your attention to approximately late summer, early fall 1985, were your mother and father living together at that time?

A In 1985?

Q Yes.

A They were up until September.

Q And, then what happened?

A Okay. My mother moved out from my father, she left him Memorial Day, or Labor Day, whichever day falls in September.

• • •

Q Ms. Heck, did you ever observe any physical violence between your mother and father?

A Before? When we all lived on the farm?

Q Yes.

A Yes, I did, a lot.

Q Would you tell the jury about that.

A Well, on one event, we were all down here at the . . . they had like a jamboree down here between the Jesse Hunt House and, I don't know what's on the other corner. It's just right down . . . back there and on the way home, well, my mother had accused my father of seeing a girl that was there and

along the way home, he got violent with her and grabbed her head, right here, and started smashing her head against the back of the truck and I was sitting on the other side of her and I was trying to cushion the blows and it didn't work and when we. . . well, on the way home, he was driving fast anyway, and there's these little, they're like horses, you know, the little wooden horses that have the lights on them, we went smashing through those. I'd say about ten or twelve of them and when we got home, he called the police up and told them that, well, the Sheriff's Department, told them that he had hit them, that some kid had stuck them in the road or something and like, he was trying to get them to pay for it. Pay for his truck. The damage that it was caused and, so, he had went down to meet them and at that time I was persuading my mother to leave with me and we left that night. Took a lot to talk her into it, but we left that night, because she was bruised, she was. . . and we went and. . . she didn't want to go to my aunts or anything, because she didn't want them to know she was having marital problems or something, but I eventually talked her into staying at my Aunt Marilyn's that night.

Q: Prior to their separation, did you observe any other physical violence?

A: Yes.

Q: What was that?

A: This was just a lot of it. Just. . .

Q: Did you ever observe any injuries your mother received as a result of this?

A: Before she left my father?

Q: Yes.

A: Yes, there was bruises and he liked to grab, there's a muscle here (INDICATING) and he always liked to grab between the muscle and the bone right here and squeeze and bruised, left bruises and he liked to grab at the knee and squeeze and leave bruises. That's where she was bruised that one night also, right on the knee.

* * *

Q: Bobbi, at any time. . . directing your attention to Wednesday of that week [the week of the disappearance], did you receive any phone calls, that you recall?

A: Yes, I did. I was at work at Dillsboro Manor and our work hours were six to two-thirty and I received a call around, it was around lunch time and my father asked me to meet him after work. Okay, he gets off at three-thirty. He wanted me to meet him at the 4th Street Pub and during the conversation he ask me if I knew anything about mom taking a trip to Florida. Okay, and I hadn't, because I had not been corresponding with mom and I told him that I hadn't and he just said that she had taken a trip. He said something, but anyway, he ask me to meet him at the Pub after work.

* * *

[Testimony indicating that petitioner had been arrested on a charge of failure to appear for the battery trial and that the witness went to visit him at the jail omitted]

Q: What did your father request?

A: Okay. He requested us to go up in the attic and get a . . . he had. . . okay, he said that there was going to be a search over home and he didn't want to be connected with any of mom's things and when he had went and got her car, because she had supposedly called him at three o'clock in the morning and asked him to get her car. He got. . . apparently got in her house and took a few things and he said that there was going to be a search and he didn't want to be connected with any of mom's things and he asked us to go up in the attic and he said, there's a little ledge there and he said, you reach over the ledge and you'll find one of mom's spare purses. He said he'd got it, because he thought there might be money in it. And, I knew my dad was good at selling stuff and hocking stuff and all that stuff.

* * *

Q: Your father make any other requests?

A: Yes. He ask us to get a suitcase, that was located at the bottom of the stairs and he said he just got that out of the trunk of mom's car.

Q: And, did he request anything else?

A: Okay. He ask us if. . . well, he ask me. . . he pointed at me, because of the sink hole, I'd lived on the farm for a long time, forever, it seems and he asked me if I knew where the sink hole was at. . . . And, he asked us if I knew where that place was, okay, but then when he asked us what we was going to do, he pointed at both Shirley and I. . . .

• • •

Q: What did he request?

A: Okay. He requested that we go get two things of pepper and sprinkle on that area, because he said there was going to be a search and he said that he had hidden mom's T.V., radio and jewelry box down there and just to sell, because he had the key to her trailer.

Q: Roberta, what did your father request that you do with this pepper?

A: Oh, sprinkle it on there, I'm sorry, just sprinkle it on the whole area.

• • •

Q: Did you[r] father ever tell you why, he wanted this pepper sprinkled?

A: He said that there was going to be a search and that he didn't want to be connected with any of mom's stuff. Well, he said there was going to be a search and. . . the only think I could think of, was that he didn't want to be connected with mom. . . you know, because they had asked questions about mom's disappearance and here he was with mom's stuff.

• • •

Q: What happened to the purse?

A: Okay. Right after my dad got out of jail on Friday, I think he got out on Friday, he called me up and said he'd be down to

get it. Okay. and that was about a fifteen minute drive and at the time I looked through it, when he was on his way to come down and get it.

Q: You looked through the purse?

A: I looked through. . . well, I got time to look through the top part of it.

Q: What did you see?

A: I found her wallet with her drivers license and her social security card and some make-up and stuff like that in it.

• • •

Q: Roberta, prior to the time that your father got out of jail, did he make any other requests of you?

A: To make a phone call.

Q: What type of phone call?

A: To the jail house and say that. . . he ask me first, to say that I was Rickie Heck, because he. . . because they told him if they heard from mom, he could get out.

R. 794-816

BILL KINNETT, BEING FIRST DULY SWORN AND UPON HIS OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY JAMES D. HUMPHREY, PROSECUTING ATTORNEY.

• • •

Q: Mr. Kinnett, directing your attention to New Years Eve 1985, the early morning hours of New Years Day 1986. Did you have an occasion at that time to meet with Rickie Heck?

A: Yes, I did.

• • •

Q: What did she tell you at this time, Mr. Kinnett?

[Objection made and overruled]

A: Okay. She said that she needed to get access to a gun, because she was afraid that Roy was going to try to kill her.

MARILYN CHRISMAN, BEING FIRST DULY SWORN AND UPON HER OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY JAMES D. HUMPHREY, PROSECUTING ATTORNEY.

• • •

Q: And, are you the sister of Rickie Heck?

A: Yes.

• • •

Q: Directing your attention to December of 1985, Marilyn, did you have occasion to have lunch with Rickie during that month?

A: Yes, we had lunch a few times. The one time was, ah, I think about the 19th of December, we were to meet as Frisch's for lunch.

Q: And, did you meet at Frisch's?

A: No, we didn't.

Q: Where did you meet?

A: At her trailer.

• • •

Q: Marilyn, did you end up going to the trailer?

A: Yes, I did.

Q: And, what happened when you arrived?

A: Well, ah, it took me about twenty minutes by the time I left work, picked up our dinner at Frisch's and then went to her trailer, ah, and when I knocked on the door, I heard some noise and she was moving about, like she was frightened. I don't know what was going on in there, and it took me a few minutes to convince her that it was me, and she finally opened the door and when she did, she had a pair of scissors in her hand like this (INDICATING) and when she saw it was me, she laid the scissors back down. I think it was like on a cedar chest there by her front door.

Q: And, what happened then?

A: Well, I went in and I put our lunch on her table, but she never did eat. She didn't touch a bit of her food, ah, and she proceeded to tell me what had happened and show me some bruises on her.

Q: Where did you see these bruises?

A: She took her slacks off. They were from like her knees, they just came right up and, although she didn't take her underclothes off, you could see where sort of up above her stomach, into her stomach, it was bruised.

Q: Did she tell you anything about these bruises?

A: Yes.

Q: What did she tell you?

[Objection made and overruled]

A: Okay. Ah, a few days earlier, she had been at the American State Bank and I . . . that Roy came in the bank and drug her out or they went out and he put her in the car, and she said he grabbed this arm around her head and kept banging her head against this door and this fist, he kept hitting her with this fist, and that's how the bruises, how she got the bruises.

Q: During the time on this same date, did you notice anything unusual about the trailer?

A: Well, it was really neat, except just like where she had met me at the door with the scissors, within arms reach of anyplace in the trailer, I didn't go back into the hall or the bathroom, but there was little table there by her couch, I think, and there was knife there, there was scissors laying by her bed, ah, there was knives or scissors within arms reach of anyplace in her trailer.

Q: Marilyn, on this same occasion, did Rickie ask you to do anything or make any requests of you?

A: Yes.

Q: What requests did she make?

[Objection made and overruled]

A: Okay. She said that Roy was going to kill her, ah, and she would come up missing and she made me promise her that I would investigate and I wouldn't stop until I. . . well, she said she didn't want the sonofabitch to get by with it, and I promised her.

Q: Marilyn, when was the last time you saw Rickie?

A: Ah, New Years Eve, December 31st.

Q: Did you have any information at that time or any time later that she was planning on leaving the area, taking a trip?

A: None.

• • •

R. 1186-99

TESSIE STANDRIFF, BEING FIRST DULY SWORN AND UPON HER OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY JAMES D. HUMPHREY, PROSECUTING ATTORNEY.

• • •

Q: Now, Tessie, back in January of 1986. . .

A: Yes, Sir.

Q: Where were you living then?

A: I live in Valley Village Trailer Court, lot 14.

• • •

Q: Okay. And, could you see Rickie Heck's trailer from your trailer?

A: Yes, Sir.

• • •

Q: Okay. Now, let's go back in time to January 5, 1986, a Sunday.

A: Yes.

Q: Did you work on that day?

A: Yes, Sir.

• • •

Q: About what time did you get home from work?

A: Yes, I came from work, it's 11:30 in that night.

• • •

Q: Where did you look when you looked out the window?

A: In my trailer—UNINTELLIGIBLE—the Rickie Heck trailer, because just notice they have lights on outside and in.

• • •

Q: What happened then?

A: Then I went up and then, I just saw a man knock on the door, about just five or ten minutes I guess, but I'm not too sure what time it is.

• • •

Q: Okay. Then what happened?

A: Then what happens he was knocking the door so hard.

Q: He's knocking on the door hard you say?

A: And harder and harder, two times.

• • •

Q: Did you ever see Rickie Heck?

A: Yes.

Q: Did she answer the door when he was knocking

A: Not first I don't, but the second time she answered the door.

• • •

Q: Yes. Tell the jury what you heard.

A: Yes, he said, he, "It's a motherfucker, your coming home with me." He says, "Yes, your my wife."

• • •

Q: What did she say?

A: She said she's com. . .she's not going home, she's not going back home with him, because this my apartment.

• • •

Q: Did any. . . what happened after they said these things?

A: And, they say that thing and then they just go in that trailer and the front there and shut the door.

Q: Are you saying he went in the trailer?

A: Yes, Sir.

Q: Did she let him in or how did this happen?

A: Well, it happen, he don't let her in, she was stopping him, she don't want to become. . . get in that trailer, but he pushed into get in that trailer and then he shut the door.

Q: He pushed to get in the trailer and then shut the door?

A: Yes. Yes, Sir.

R. III, 579-880

LYMAN CONLEY, BEING FIRST DULY SWORN AND UPON HIS OATH, TESTIFIES AS FOLLOWS, WITH DIRECT EXAMINATION BY ROBERT J. EWBANK, SPECIAL PROSECUTING ATTORNEY.

Q: And, what is your occupation?

A: I'm an Indiana State Trooper.

• • •

Q: Okay. Now, I'd like to call your attention to October the 27th, 1986.

• • •

Q: What do you recall about that day?

A: I was assigned to assist Detective Kreinhop upon the serving of a search warrant on the Roy Heck farm, north of Lawrenceburg.

• • •

Q: And, who served the warrant?

A: Detective Kreinhop read the search warrant to Mr. Heck. I was present with him, we both went to the residence, we read it to him, gave him a copy of the search warrant and then we left his house and moved back to the location where we were going to excavate.

Q: Did the defendant, in any manner, respond to your enunciation of the search warrant.

[Objection made and overruled]

A: The search warrant was read to the defendant, there at his residence. Defendant then asked if. . . where we were going to dig at, ah, Detective Kreinhop responded with that we were going to dig out by the road. . . .

• • •

A: Detective Kreinhop and I got in my car and we drove back to the location where the. . . at the corner in the bend in the road there where that one area of trash and debris was located, we were going to start to dig at that point.

Q: Is that also known as the sink hole site?

A: Right, the sink hole.

• • •

Q: Did anything significant happen at the time on the 27th, when you initially started your search of the sink hole site?

A: Detective Kreinhop and I had just returned to the sink hole site, when there was a vehicle came out from the residence, it was very shortly afterwards, like four or five minutes after we'd left the residence at a high rate of speed, went by us, made the turn and left the area and we didn't see the vehicle again after that while we were on the property.

• • •

Q: Now Officer, at the time this bucket first dragged the torso from the gravesite, where you smelled the strong odor. . .

A: Yes, it was very foul.

Q: Did you observe anything unusual about the curling iron as far as its location.

A: One end of the cord, near the plug in, was hooked up. . . had been gathered up by the bucket at the same time that it hooked up with the material. The curling iron came down away from the hook on it and was down and around the edge of the sleeve that was there and was entangled in the coat itself where the neck area was at and then hung down on the ground.

• • •

Q: Okay. And was it wrapped. . . it was wrapped around the neck area?

A: Yes, it was.

R. V, 1238-R. VI, 1258.

Supreme Court, U.S.
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No. 93-6188

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROY HECK,
Petitioner,

v.

JAMES HUMPHREY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' brief is most significant for what it does not say. Respondents do *not* deny that the damages sought by petitioner are unavailable in state post-conviction or federal habeas proceedings. Respondents do *not* assert that petitioner's claim raises doubts about the correctness of any state judicial determination. And, despite much hemming and hawing, respondents do *not* contend that a victory by petitioner in his damages action will have preclusive effect in subsequent state post-conviction proceedings. But respondents nevertheless insist that petitioner's federal action must be dismissed so that a state court—in the course of the exhaustion of state procedures that concededly cannot provide petitioner with the only relief he seeks—will have the opportunity to opine on petitioner's constitutional claims.[1] Not surprisingly, this counter-intuitive argument is not compelled by principles of comity and cannot be reconciled with this Court's precedent. It should be rejected.

I

1. As we have explained (Br. 20-23), this Court cannot hold for respondents without overruling *Wolff* v. *McDonnell*, 418 U.S. 539, 553-555 (1974), and disavowing the reasoning of *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973). Respondents' efforts to explain away these decisions are wholly insubstantial. They first suggest that the Court may disregard its statements in *Wolff* because that case, unlike (purportedly) this one, did not involve "an attack on the legality of a valid state court convic-

[1] In fact, we have been informed that petitioner has received a parole release date of May 1, 1994. Petitioner's release, however, will have no bearing on the live nature of the controversy in this case. If the court below correctly dismissed petitioner's Section 1983 action, petitioner will have to initiate a new lawsuit, which will be met with a statute-of-limitations defense and may be time-barred. If the court erred in dismissing the action, petitioner's suit will proceed on the merits.

tion." Resp. Br. 26.[2] But we explained in our opening brief (at 22-23) that the Court stated in *Preiser*—in a portion of the opinion that most certainly was *not* dictum—that an attack on the length of confinement (which was at issue in *Wolff*) and an attack on the conviction itself are *equally* "close to the core of habeas corpus." 411 U.S. at 489. Respondents simply ignore that principle, which establishes that the situations here and in *Wolff* are not distinguishable for comity purposes.[3]

Nor are respondents successful in dismissing *Wolff* on the ground that "[n]othing in *Wolff* suggests that the prisoners were seeking damages to compensate them for the *actual loss* of good-time credits," so that "[t]he prisoners' damages claims appear to have been intended to compensate them for being subjected to unconstitutional *procedures* relating to the withdrawal of good-time credits, *irrespective of the results of those procedures*." Resp. Br. 26 (emphasis added). Although we wholeheartedly agree with respondents that the violation of constitutional rights occurring in the process of determining guilt or punishment may give rise to a valid damages claim *regardless* of the outcome of those processes (but cf. Resp. Br. 8 n.4), we fail to see how this distinction makes any difference in the proper interpretation of *Wolff*. As we explained in our opening brief (at 22), if the prisoners in *Wolff* succeeded in demonstrating that the prison procedures used to withdraw good-time credits were unconsti-

[2] As explained below (see pp. 5-6, *infra*), respondents are in any event mistaken in their repeated assertion that this case involves an "attack" on petitioner's conviction or that in order "to award damages, a federal court would first have to find that petitioner's conviction was wrongful." Resp. Br. 13-14; *id.* at 20.

[3] Respondents rely on "the distinctive comity concerns relating to federal court deference to state *courts*," a concern they say "played no part in *Wolff*." Resp. Br. 26 (emphasis added). But that argument also ignores the teaching of *Preiser*, as we explained in our opening brief (at 26 n.13) and as to which respondents have offered no colorable response (see Resp. Br. 18 n.7).

tutional, then any such withdrawals would likewise have been invalid. Respondents offer no response on this point. And their distinction is even less tenable because the prisoners in *Wolff* in fact contended that the withdrawal of good time was *itself* part of the deprivation of liberty that gave rise to their due process claim. See Resp. Br. No. 73-679, at 15 (arguing that "the loss of good time remained a salient and essential factor to be weighed in considering" whether the plaintiff prisoners had suffered a "grievous loss" sufficient to trigger a due process action).[4]

Respondents' efforts to minimize *Preiser* (Resp. Br. 27-28) should be rejected as well. Respondents never come to grips with this Court's unambiguous declaration in *Preiser* that "[i]f a state prisoner is seeking damages, he is attacking *something other than* the fact or length of his confinement * * *." 411 U.S. at 494 (emphasis added). Respondents contend that "[b]y its own terms, this dictum is limited to situations where, *unlike* here, a state prisoner is 'attacking something other than the fact * * * of confinement.'" Resp. Br. 28 (emphasis in original)). But this is a plain misreading of the Court's opinion, which explained that "[i]f a state prisoner is seeking damages," by definition "*he is* attacking something other than the fact or length of his confinement." 411 U.S. at 494 (emphasis added). Indeed, respondents' assertion that the *Preiser* Court did not have cases like

[4] Respondents are equally mistaken in contending that this Court's relevant teachings in *Wolff* "may be fairly characterized as dictum" because "it is unclear whether damages could have been recovered by the prisoners in *Wolff*, given this Court's decision not to apply its holding retroactively." Resp. Br. 27 n.11. The crucial point for present purposes is that the Court reached the merits of the *Wolff* prisoners' claims—which it would not have done had the rule of *Preiser* applied. Not surprisingly, respondents cite no decision of any court that has regarded this portion of *Wolff* as dictum, and we are aware of none. See also, *e.g.*, *Gerstein* v. *Pugh*, 420 U.S. 103, 107 n.6 (1975) (citing and relying on this portion of *Wolff*).

this one in mind is flatly belied by *Preiser*'s illustrative citation to *Ray* v. *Fritz*, 468 F.2d 586 (2d Cir. 1972), the significance of which was explained in our opening brief (at 22 n.10) and is not disputed by respondents. Respondents also are mistaken in saying that this Court "[a]cknowledg[ed]" that the foregoing statement in *Preiser* was "unnecessary to its decision." Resp. Br. 27. On the contrary, the Court's statement in *Preiser* was made in the course of rejecting an argument that, if accepted, would have pointed to a result contrary to that reached by the Court. That hardly qualifies as dictum.

2. The rule of *Wolff* and *Preiser* is not the "formalism" derided by respondents (Br. 9). The Court's rationale in *Preiser* was clear: habeas corpus provides the most specific remedy for a prisoner requesting release. And habeas corpus plainly was available to the prisoner-plaintiffs in *Preiser*, who quite literally had, in challenging their release dates, effectively taken a habeas petition and put "a different label on their pleadings." 411 U.S. at 490. That is demonstrably not true here, where the relief requested is not available in federal or state habeas and the defendants are not the ones who would be named in a habeas action—all as respondents do not deny. It is hardly formalistic to decline to apply a rule where its rationale has no application.

In fact, far from being artificial, the approach of *Wolff* and *Preiser*, which turns on whether the plaintiff seeks damages or release, is the most manageable and logical approach in this area. As we explained in our opening brief (at 29-31), respondents' rule—which, as we understand it, would have the necessity of exhaustion turn on the determination whether the Section 1983 action "attack[s] the legality of a valid state-court conviction" (Resp. Br. 8-9)—is not nearly so simple as respondents would have the Court believe. As we noted, any number of meritorious constitutional challenges to aspects of the investigation and prosecution of a criminal case may not call the validity of the conviction into question. See

Haring v. *Prosise*, 462 U.S. 306 (1983). Respondents dismiss this problem with the assertion that lower courts have had no difficulty determining when challenges go to the validity of a conviction. Resp. Br. 25. But that contention is not responsive; our point is that no matter how "easy" it is, conducting the proper inquiry diligently is a time-consuming matter that will require the federal court to engage in a review of the merits of the Section 1983 action *before* deciding whether exhaustion is appropriate. Cf. *Davis* v. *Rendell*, 659 F.2d 374, 378 (3d Cir. 1981).

Some of these possible difficulties are illustrated by this case itself. Respondents repeatedly contend that petitioner's damages claim is an "attack [on] a valid Indiana conviction" (Resp. Br. 6) or "an attack on the legality of [petitioner's] conviction and the propriety of his continued confinement." *Id.* at 5; see also *id.* at 1, 6, 8, 11, 14, 16, 18, 20, 23, 24, 25, 26 n.10, 26, 28, 30, 32, 34. Respondents also suggest that *all* of the damages petitioner seeks to recover flow from "the alleged wrongfulness of his confinement." *Id.* at 8 & n.4. See also *id.* at 23. Petitioner's claim, however, is not an attack on his conviction or his continued confinement but rather a challenge to *the lawfulness of the individual defendants' actions.*[5]

[5] Respondents therefore are incorrect in contending that "[n]either in his complaint nor at any other time throughout these proceedings has petitioner suggested that his claimed damages relate to anything other than his contention that his conviction was wrongful and his continued confinement improper." Resp. Br. 8. In fact, petitioner's complaint sought compensatory damages "for violating [petitioner's] civil rights *and* his losses incur[r]ed from his empl[o]yment and farm operations." J.A. 7 (emphasis added). While the violation of petitioner's constitutional rights may have led to his conviction, it does not follow that the *only* damages suffered by petitioner stem from his conviction. Cf. generally *Albright* v. *Oliver*, 114 S. Ct. 807, 815 (1994) (Ginsburg, J., concurring) (noting various harms that can result from Fourth Amendment violation independent of any harm stemming from criminal conviction); *id.* at 821-22 (Souter, J., concurring in the judgment)

Respondents' assertion that a federal court could not award damages in a case such as this one unless it first found the prisoner's conviction illegal is therefore demonstrably erroneous. At the very least, a court could award a plaintiff *punitive* damages without making any such finding. Punitive damages are available under § 1983 upon a showing of reckless disregard or indifference to constitutional rights, even if the victim cannot prove compensable injury. *Carlson* v. *Green*, 446 U.S. 14, 22 n.9 (1980); see also *Smith* v. *Wade*, 461 U.S. 30, 54-55 & n.21 (1983); *Erwin* v. *County of Manitowoc*, 872 F.2d 1292, 1299 (7th Cir. 1989); *Green* v. *McKaskle*, 788 F.2d 1115, 1124 (5th Cir. 1985). In this case, for example, petitioner could recover punitive damages on his claim concerning destruction of exculpatory evidence simply by showing that the defendants recklessly violated his rights under *Brady* v. *Maryland*, 363 U.S. 83 (1963). The correctness of this analysis is recognized by the *amici* states that are supporting respondents. See *Amici* Arizona *et al.* Br. 21 ("consideration of the punitive damage and declaratory judgment claims does not require the federal court to necessarily conclude that [petitioner's] conviction is wrongful"). In addition, petitioner might well be able to recover nominal damages for respondents' violations of his constitutional rights regardless of the impact of those violations on his criminal conviction.[6]

(same). And petitioner's complaint requested *punitive damages* for violations of petitioner's constitutional rights (see *ibid.*)—a fact completely ignored by respondents.

[6] The strained nature of a test that looks to whether a conviction is somehow "called into question" by the Section 1983 action is made especially clear when a challenge rests on asserted violations of the Fourth Amendment. Claims involving the introduction of illegally obtained evidence are not cognizable under Section 2254 at all. See *Stone* v. *Powell*, 428 U.S. 465, 480-482 (1976). The exhaustion rule of *Preiser* therefore necessarily cannot apply in such a case. Yet petitioner has advanced a Fourth Amendment claim here. See J.A. 4; see also *id.* at 5, 78. Accord *Amici* Arizona, *et al.* Br. 21 (recognizing that petitioner is alleging "an illegal search"). We

3. In nevertheless asking the Court to depart from the approach of *Wolff* and *Preiser*, respondents purport to rely on principles of comity. But the Court should be clear on just how insubstantial is the interest asserted by respondents. At the outset, the suggestion (Resp. Br. 15-16) that collateral estoppel might operate to bar a state from relitigating an issue decided in a prisoner's favor in a prior § 1983 damages action is the reddest of herrings. Respondents concede that "as a general matter, a judgment against a state official in his personal capacity will not bind the government in future litigation" (Resp. Br. 15); they recognize that "not all (or possibly even most) prisoner § 1983 claims attacking the legality of a conviction would have preclusive effect on the state" (*id.* at 16); and they pointedly refrain from suggesting that Indiana would be barred under res judicata from relitigating *any* issues determined in this § 1983 action (*id.* at 16 n.5). They nevertheless ask the Court to rule in their favor because in some future case a state might be bound in a subsequent habeas action if the state exercised sufficient control over the defense of a prior § 1983 suit brought against state officials in their individual capacities. See Resp. Br. 15-16 (citing *Montana* v. *United States*, 440 U.S. 147 (1979)).

The argument is entitled to no weight. Respondents have not cited a *single* case where a government has been held estopped by a judgment against an individual, and diligent research has not disclosed one. On the contrary,

accept as true respondents' representation that materials in the State of Indiana's possession demonstrate that petitioner raised a Fourth Amendment claim during his trial but did not renew that claim in his direct appeal in the Indiana courts. See Resp. Br. 4; Resp. Br. App. 2. But whether that claim—which appears to have been based on an allegation that the search warrant was defective (Resp. Br. App. 2)—is the same as the Fourth Amendment claim asserted in petitioner's Section 1983 action (see J.A. 4-5, 78) cannot be determined from the materials contained in the appendix to respondents' brief.

all of the reported cases of which we are aware hold that collateral estoppel does not operate where successive lawsuits involve governmental defendants who are sued in different capacities. See, *e.g.*, *Headley* v. *Bacon*, 828 F.2d 1272 (8th Cir. 1987) (city officials sued in their individual capacities were not estopped from litigating issues plaintiff had won in § 1983 action against the city); *Garza* v. *Henderson*, 779 F.2d 390 (7th Cir. 1985) (prison officials sued in their individual capacities were not estopped from litigating issues plaintiff had won in *Bivens* action against prison authorities). Indeed, even respondents cannot bring themselves to say that the factors they list *ever* actually would lead to estoppel (see Br. 15 & n.5, 6). Respondents thus are trying to have their cake and eat it too by asking the Court to base its rule on an eventuality that never will come to pass. Yet as respondents themselves recognize while attempting to gore someone else's ox, "[s]peculative concerns about" events "that, in all likelihood, will never take place, are an extremely poor foundation on which to base" any decision by this Court. Resp. Br. 29.[7]

4. The more general concerns of comity articulated by respondents have no substance here. The Court's holdings premised on comity all have had a grounding in the practical realities of government: they are concerned with the possibility of friction where the actions of a federal court would enjoin or otherwise interfere with ongoing state proceedings (see, *e.g.*, *Younger* v. *Harris*, 401 U.S. 37 (1971)); with the institutional competence of federal courts (see, *e.g.*, *Railroad Comm'n* v. *Pullman*, 312 U.S.

[7] In any event, even if respondents are correct that in some minute fraction of cases, the general rule of *Montana* might call for the application of collateral estoppel in a subsequent habeas action brought against a state, there is no reason why this Court could not eliminate that risk by announcing that the federal-law rule of *Montana* would not apply in that context. Cf. *United States* v. *Mendoza*, 464 U.S. 154 (1984) (announcing special rule of collateral estoppel applicable where the United States is a party).

496 (1941)); or with the effect on state institutions that would be effectively *displaced* by organs of the Federal Government (see, *e.g.*, *Rose* v. *Lundy*, 455 U.S. 509 (1982)). But such concerns have absolutely no bearing here.

Indeed, the holdings upon which respondents principally rely themselves demonstrate how far removed is this case from those in which comity principles have led federal courts to decline their " 'virtually unflagging obligation' to exercise the jurisdiction given them." *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1087 (1992) (citation omitted).[8] In *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981) (cited by respondents at Br. 11, 21), taxpayer plaintiffs brought a Section 1983 damages action challenging various local tax practices as unconstitutional; the individual defendants were "not one or two isolated administrators, but virtually every key tax official in St. Louis County." *Id.* at 114. The Court held that the action could not proceed because it would have had an extraordinarily intrusive effect on the processes of local government.

Not only would such a lawsuit "hale state officers into federal court every time a taxpayer alleged the requisite elements of a § 1983 claim" (*id.* at 115), but

> a judicial determination of official liability for the acts complained of, * * * would have an undeniable chilling effect upon the actions of all County officers governed by the same practicalities or required to

[8] Respondents' reliance (at 6, 19, 21) on *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983), is entirely misplaced. The *Rooker-Feldman* doctrine ordinarily bars direct review in the lower federal courts of a decision reached by the highest state court, on the theory that such reviewing authority is vested solely in this Court pursuant to 28 U.S.C. § 1257. *Feldman*, 460 U.S. at 476. The rule is one of preclusion, not of exhaustion. In any event, petitioner obviously is not seeking to appeal (or even to attack) his criminal conviction in this Section 1983 action.

> implement the same policies. There is little doubt that such officials, faced with the prospect of personal liability to numerous taxpayers, * * * would promptly cease the conduct found to have infringed [the plaintiffs'] constitutional rights, whether or not those officials were acting in good faith. In short, [the plaintiffs'] action would "in every practical sense operate to suspend collection of the state taxes * * *."

Ibid. (citation omitted). The Section 1983 action thus would have had the effect of working a jurisdiction-wide interference with the administration of the tax system. Here, in contrast, petitioner's action plainly will have no impact on the functioning of government; indeed, as we have explained, it will have no effect even on petitioner's sentence.[9]

The cases of *Younger* abstention upon which respondents rely (Br. 10, 19-21) also involved federal actions that could have caused real interference with essential processes of state government. As respondents themselves recognize (Br. 19 (emphasis added)), the *Younger* doctrine comes into play when federal courts are asked "to disturb *ongoing* state proceedings, particularly criminal ones." The practical dangers to the interests protected under the rubric of comity when federal courts enjoin or otherwise interfere with state judicial proceedings are manifest: serious friction and resentment may be anticipated if a federal court enjoins proceedings in a state tribunal (which would, after all, amount to a direct assertion that the state court was in some way defective); similarly, such a federal action would disrupt the state judicial system in the most direct way possible, while likely also necessitating duplicative proceedings. See generally *Younger* v. *Harris*, 401 U.S. 37, 44 (1971); *Juidice* v. *Vail*, 430 U.S. 327, 334 (1977); *Moore* v. *Sims*, 442 U.S. 415, 423 (1979); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 604 (1975). But again, there is no parallel state interest at stake in this case, where there is no ongoing state proceeding with which petitioner's action could interfere.[10]

[9] In fact, in *Fair Assessment* the Court held that the plaintiffs were "*barred* by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." 454 U.S. at 116 (emphasis added). Thus, *Fair Assessment* involved a claim that was held not to be cognizable under § 1983 at all, rather than a claim that was cognizable but could be brought only after exhaustion of other remedies. What is more, the majority in *Fair Assessment* gave as one reason for shutting the doors of the federal courthouse the fact that if plaintiffs' claim were permitted ever to proceed in federal court, it would have to proceed immediately because of the general non-exhaustion rule. See *id.* at 114-115. Here, of course, respondents do not deny that petitioner has stated a cognizable Section 1983 claim.

In fact, respondents are unable to point to any manner in which petitioner's action will interfere even remotely with the processes of state government. Exhaustion generally is mandated in habeas proceedings because of the uniquely intrusive nature of the habeas remedy, which has the effect of nullifying a conviction (or sentence) and short-circuiting the use of state judicial remedies. But an action like petitioner's for money damages—which, it again bears emphasis, are not available in state post-conviction proceedings—does not call into question the correctness of any state judicial determination, does not pretermit use of state judicial procedures (which will have to be invoked if the prisoner seeks release), and does not reflect negatively upon the state courts' ability to enforce constitutional principles. After all, the prisoner's action cannot cause friction by disturbing a state judgment of conviction; it is only a habeas action that has the practical effect of setting aside a state judgment. And for a federal court to provide relief on an *un*exhausted claim does not reflect negatively on the state courts. (To the contrary,

[10] Respondents' argument that "[t]he reasons this Court has held that abstention is inappropriate when state proceedings have yet to begin have no application here" (Br. 20 n.8) is belied by the indisputable fact that *Younger* abstention is inapplicable in this case—as respondents do not deny.

it is a federal court's disagreement with a state court on an exhausted claim that causes harder feelings.)

Nor are respondents correct in suggesting that only a rule of exhaustion would permit the state courts to become familiar with and hospitable toward federal constitutional issues, lead to the development of uniform state rules, or allow the compilation of more complete records. Resp. Br. 12, 14, 20. Respondents have simply offered no reason to believe that these concerns are disserved by having a federal court be the first to adjudicate a prisoner's § 1983 action, particularly if the case must return to the state court for the prisoner to seek release.[11] And respondents' argument (Br. 20) that our approach may lead to inconsistent judgments adds nothing to their position. It is an unavoidable consequence of the dual federal-state court system that there will have to be multiple proceedings in a case such as this one: a state post-conviction (and possibly a federal habeas) proceeding if the prisoner seeks release, and a federal action if the prisoner seeks damages. The only question here is the timing of those proceedings.

Respondents' further argument (Br. 24-25) that our position creates a peculiar hierarchy of values because it allows the prisoner immediate access to federal court for damages while he has to wait to seek release from a federal court is simply silly. The prisoner gets immediate access to federal court in the former situation because a damages action is not the equivalent of a habeas petition, for which state post-conviction proceedings are an acceptable substitute. It thus is undisputed that prisoners get immediate access to federal court for cases challeng-

[11] Respondents have not explained why the existence of a federal judgment touching on issues that arise in a later state proceeding is a cause for concern. Having the federal judgment on the books might well assist the state court without displacing it. After all, federal courts sometimes disagree with state courts by granting habeas petitions; there is no reason to doubt that state courts will do the reverse in appropriate cases.

ing the conditions of confinement, even though those cases are in some sense less important than actions contesting the legality of confinement; that is because conditions cases—like damages actions generally—are not treated as habeas corpus petitions under the rationale of *Preiser*.

In addition, it bears emphasis that respondents' myopic focus on Indiana's interests disregards other important concerns. We explained in our opening brief (at 27-29) that respondents' position takes no account of the policies that underlie Section 1983; respondents make absolutely *no* response. *Preiser* gave a particular reason why congressional intent countenanced disregarding those policies in the circumstances of that case—a reason, as we have explained, that has no application here.[12]

II

If this Court nevertheless concludes that exhaustion is required, it should reverse the court of appeals' decision to dismiss rather than stay petitioner's Section 1983 action. We explained in our opening brief (at 33-41) that

[12] We explained in our opening brief (at 12) that CRIPA confirms the congressional intent regarding application of the "no-exhaustion" rule to most prisoner Section 1983 claims. Respondents nevertheless suggest that reading CRIPA to foreclose exhaustion in a case such as this would "leave[] no room for the rule announced in *Preiser*." Resp. Br. 21-22 n.9. *Preiser*, however, involved a claim that this Court determined was cognizable *only* in an action for habeas corpus (*and not* in an action under Section 1983). See 411 U.S. at 489, 500. Although this Court's decision in *Preiser* explored the boundary between habeas corpus and Section 1983 and discussed the purposes underlying the *habeas* exhaustion requirement, it did not impose any *exhaustion requirement* on the prisoner's Section 1983 action. For that reason, petitioner's interpretation of CRIPA hardly can run afoul of "the rule announced in *Preiser*." Nor would it come as a surprise if the legislative history of CRIPA made no mention of *Preiser* (see Resp. Br. 22 n.9), since the action involved in *Preiser* was determined by this Court not to involve any claim cognizable under Section 1983. Respondents have never suggested—nor could they—that petitioner's action is cognizable *only* in an action for habeas corpus.

the court of appeals' rule of dismissal is inconsistent with the manifest congressional intent as expressed in CRIPA and with this Court's holding in *Deakins* v. *Monaghan*, 484 U.S. 193, 202 (1988). The court of appeals' approach also raises the risk that a damages action, when refiled after exhaustion, will be barred by the statute of limitations. And the Seventh's Circuit's effort to deal with this problem through the creation of a complex, federal equitable tolling rule would not only create a new layer of wasteful and time-consuming litigation but also inevitably bar some meritorious Section 1983 actions that have been rendered stale by the dilatory processing of claims for state post-conviction relief.

1. Respondents' efforts to answer these arguments are wholly unconvincing. Perhaps recognizing that Congress's clear intent as reflected in CRIPA counsels strongly against their proposed rule of dismissal, neither respondents nor their *amici* make *any* attempt to explain why the stay provision in CRIPA does not demonstrate that a stay rather than dismissal is appropriate in this setting. Respondents' perfunctory effort to distinguish *Deakins* (Resp. Br. 30 n.13) is similarly unavailing. Respondents suggest that *Deakins* is inapposite because it did not involve "claims that lay at [the] core of habeas corpus." Resp. Br. 30 n.13. But, as explained above, petitioner's damages claim cannot be said even to be cognizable in a habeas action, much less to lie "at [the] core of habeas corpus." [13]

[13] Contrary to respondents' suggestion (Resp. Br. 30), *Fair Assessment in Real Estate Ass'n* v. *McNary*, 454 U.S. 100 (1981), does not support a rule of dismissal here. In that case, the Court held that "taxpayers are *barred* by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." *Id.* at 116 (emphasis added). Because the Court established an absolute prohibition on proceeding in federal court, it would have been inappropriate to stay rather than dismiss the action. That reasoning has no application in this case, where respondents do not suggest that petitioner's action is wholly barred from federal court.

Equally as important, comity concerns simply have no relevance to the question whether a federal court should stay or dismiss a Section 1983 action pending exhaustion. So much is clear from *Deakins*, where the Court held that "a District Court has *no discretion* to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding." 484 U.S. at 202 (emphasis added). In so holding, the Court explained that this result "allows a parallel state proceeding to go forward *without interference from its federal sibling*"; it rejected as "groundless" the notion that "the District Court, if allowed to retain jurisdiction, would 'hover' about the state proceeding, ready to lift the stay whenever it concluded that things were proceeding unsatisfactorily." *Id.* at 202-203 (emphasis added). See also *id.* at 203 (stating that it would be "inappropriate" to assume that the federal court "would not hold up its end of the comity bargain"). In short, this Court already has determined that a stay works no interference with the functioning of state courts and in no way harms the principles of comity.[14]

As for respondents' argument (Br. 29-30) that the Court's consistent approach has been to order dismissal of unexhausted habeas petitions, the short answer is that petitioner's Section 1983 action is *not* a habeas petition. In fact, respondents' argument overlooks an obvious difference between habeas proceedings and Section 1983 actions that is central to the question whether a stay or dismissal is the appropriate disposition: while the latter

[14] Respondents contend that *Deakins* "recognized that dismissal might be appropriate 'where the order to the parties to repair to the State court would clearly serve an important countervailing interest.'" Resp. Br. 31 n.13, quoting *Deakins*, 484 U.S. at 203. In fact, it is far from clear that the quoted language from *Deakins* was meant to endorse the possibility of ever dismissing a case like this. In any event, respondents have failed to identify *any* state interest, let alone an important one, that would be advanced by dismissing such an action.

are subject to statutes of limitations, the former are not. See *Brecht* v. *Abrahamson*, 113 S. Ct. 1710, 1721 (1993); *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986). Because habeas actions are not subject to time bars, dismissal poses no danger to a claimant's rights. Here, in contrast, petitioner's action will be barred if dismissed.

2. Unable to identify any authority for the proposition that the passive retention of § 1983 cases on the federal docket pending exhaustion of state remedies would interfere with state interests, respondents fall back on the argument that dismissal is appropriate because it would advance *federal* interests by ridding the federal courts of "thousands of frivolous actions" brought by state prisoners under § 1983. Resp. Br. 31.[15] In other words, respondents contend that petitioner's Section 1983 action should be dismissed rather than stayed because "the vast majority" of such actions will "ultimately be found [to be] without merit." Resp. Br. 31; *id.* at 31-35.

This argument, of course, is flatly inconsistent with the congressional decision to give state prisoners a Section 1983 remedy, and it thus is no surprise that contentions like respondents' have been rejected repeatedly by the Court. See, *e.g.*, *Felder* v. *Casey*, 487 U.S. 131, 149-150 (1988) (rejecting as "manifestly inconsistent with the central objective of the Reconstruction-Era civil rights statutes" the argument that an exhaustion requirement should be imposed on Section 1983 actions in order to "sift out 'specious claims' from the stream of complaints that can inundate local governments") (internal citations omitted); see also *Burnett* v. *Grattan*, 468 U.S. 42, 54-55 (1984); *Howlett* v. *Rose*, 496 U.S. 356, 379-380 (1990). Indeed, insofar as respondents are correct in observing that many prisoners civil rights suits clearly lack sub-

[15] Although respondents decry the retention of prisoner lawsuits on the federal docket, they fail to identify any nonnegligible costs associated with retaining jurisdiction over dormant actions.

stance, their assertion *supports* our position (Pet. Br. 40) that it will be considerably easier for courts to resolve such claims on the merits than to deal with the complex statutes of limitations questions raised by dismissing them pending exhaustion.[16]

3. Respondents' final contention—that dismissal should be ordered because state or federal tolling doctrines would protect petitioner from operation of the statute of limitations (Br. 35-38)—is equally flawed. To begin with, respondents' argument (*id.* at 36) that Indiana law would toll the two-year statute of limitations on the Section 1983 action during the pendency of the state post-conviction proceedings is inconsistent with their position in the Seventh Circuit. In their supplemental brief below, respondents (citing the *Cockley* decision upon which they now rely) canvassed several areas of state caselaw and concluded that "[t]here is, in short, no clear answer as to whether Indiana would recognize equitable tolling on the facts presented in the case at bar." CA Supp. Br. 6. See also Br. in Opp. at 18 (describing the Seventh Circuit's approach as "clearly the proper one"). In addition, respondents' unwillingness to concede that Indiana's rule would apply during the pendency of any appeal from an adverse initial decision (see Resp. Br. 36 n.20) shows that any tolling permitted by Indiana law is extremely limited. In any event, the confusion over this point serves principally to illustrate the accuracy of the

[16] It is worth noting that respondents may understate the number of prisoner Section 1983 suits that state substantial claims. It appears that a significant proportion of prisoner lawsuits are in fact settled prior to trial, resulting in some relief for the plaintiff. See Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. Ill. U. L.J. 417, 439 n.93, 458 (1993) (based on empirical study of prisoner civil rights actions in Eastern District of Missouri and Eastern District of Arkansas, finding that 5% and 6% of cases, respectively, were settled and that 8% and 16%, respectively, were voluntarily dismissed by the prisoner with or without settlement).

observation in our opening brief (at 39) that determining the nature of state tolling rules would be a difficult and time-consuming task.

As for respondents' suggestion that a federal tolling rule be created, we observed in our opening brief (at 40-41) that application of such a rule also would be burdensome and complex—and still might result in the barring of meritorious claims where, through no fault of the prisoner, the defendant was prejudiced by delay in the disposition of state proceedings. For their part, respondents make *no* attempt to defend the Seventh Circuit's cumbersome rule of equitable tolling. See Resp. Br. 38 n.21 ("[R]espondents agree with petitioner that the court of appeals' detailed discussion of the probable contours of any such [federal equitable tolling] doctrine was unnecessary, and express no opinion whether those contours were accurately described."). Compare Br. in Opp. at 18 (describing the Seventh Circuit's approach as "clearly the proper one"). But the problem cannot be avoided simply by ignoring it. According to respondents, state and federal tolling rules would save any "truly meritorious" Section 1983 claims. Resp. Br. 37 (emphasis omitted). The limitations issue, however, hardly can be litigated only after a court determines that a prisoner's claim is meritorious. On the contrary, the issue will be resolved at the threshold of prisoner § 1983 actions subject to exhaustion. That will result in an enormous waste of judicial resources.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted.

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No. 93-6188

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

ROY HECK,

PETITIONER,

-vs-

JAMES HUMPHREY, DEARBORN COUNTY PROSECUTOR, ROBERT EWBANK, ATTORNEY, AND MICHAEL KRINOPH, INDIANA STATE POLICE INVESTIGATOR,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATES OF ARIZONA, ALABAMA, ARKANSAS, CALIFORNIA, FLORIDA, IDAHO, ILLINOIS, KENTUCKY, MISSISSIPPI, MONTANA, NEVADA, NEW JERSEY, OHIO, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED[1]

Whether a prisoner may attack the legality of his state court conviction in a federal action through 42 U.S.C. § 1983, seeking declaratory and monetary relief, without first exhausting state remedies.

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INTEREST OF *AMICI*

This case presents important questions regarding the relationship between 42 U.S.C. § 1983 and 28 U.S.C. § 2254, and the federal court's power in a § 1983 action to determine the legality of a state conviction. *Amici* are states that have an interest in finality, the enforcement of their state laws, and the orderly and proper administration of their criminal justice systems. Additionally, *amici* have comity concerns regarding federal courts determining the legality of state court convictions in § 1983 actions.

This brief is submitted by *amici* through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

SUMMARY OF ARGUMENT

This case presents the issue whether a state prisoner can circumvent the various limitations on consideration of habeas corpus petitions by challenging the legality of his custody via a § 1983 action that seeks only declaratory and monetary relief, but does not directly seek release from confinement. In previous cases, this Court indicated that habeas claims may be pursued only via 28 U.S.C. § 2254, while damages claims can be pursued via a 42 U.S.C. § 1983 action. This Court has also indicated that § 1983 petitioners need not exhaust certain administrative remedies. Based upon these cases, Petitioner argues that, so long as he does not list release

from or shortening of his sentence as his desired relief, he can file a § 1983 action attacking the validity of his state conviction without exhausting state remedies. Petitioner's claims, however, must be considered in light of the limitations on habeas and on § 1983 actions.

Congress and this Court have imposed several requirements a state prisoner seeking habeas relief must satisfy before the federal court will consider the merits of his claim. These limitations insure that the state court is given the first opportunity to consider and correct any constitutional errors affecting the validity of the prisoner's conviction. They are necessitated by the States' interest in the finality of the convictions from their courts, state and federal interest in the most efficient allocation of judicial resources, and comity and federalism.

This Court has also limited federal consideration of ongoing criminal prosecutions pursuant to the *Younger*[2] doctrine of non-interference with ongoing state proceedings. The Court has applied the *Younger* doctrine in several circumstances in § 1983 actions where there were ongoing criminal proceedings, and the petitioner was seeking declaratory or injunctive relief. These decisions were based upon the equitable principle that the court should not act in equity where the claimant has an

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2. *Younger v. Harris*, 401 U.S. 37 (1971).

adequate remedy at law. They were also supported by notions of comity and federalism. The Court has further limited the scope of § 1983 by holding that the doctrines of res judicata and collateral estoppel apply to consideration of issues originating in state court.

This Court has indicated that it has yet to decide the applicability of *Younger*, and resulting exhaustion requirements, on § 1983 damages actions in which a state prisoner challenges the validity of his conviction. If exhaustion is not required, a prisoner can avoid the effect of collateral estoppel and res judicata by bringing his § 1983 action before he has raised the underlying issues in available state proceedings. More importantly, a prisoner will be able to completely circumvent the habeas requirements by urging unexhausted issues in a § 1983 action seeking only damages or declaratory judgment, then using the federal court's decision on the matter to seek release from the state or federal court. The success of such maneuvers frustrates the federalism, comity, and finality concerns that led this Court and Congress to develop limitations on habeas corpus and § 1983 in the first place. The Court should apply *Younger*, and hold that the prisoner must exhaust available state remedies for challenging his conviction before the federal court will consider his § 1983 claims arising from the state criminal investigation and prosecution.

ARGUMENT

PERMITTING A FEDERAL COURT TO CONSIDER A STATE PRISONER'S § 1983 ACTION CHALLENGING THE VALIDITY OF HIS CONVICTION WITHOUT REQUIRING THE PRISONER TO EXHAUST STATE COURT REMEDIES EFFECTIVELY NULLIFIES THE LIMITATIONS ON HABEAS CORPUS AND IMPINGES ON IMPORTANT STATE INTERESTS.

Congress has created a federal forum, via 42 U.S.C. § 1983,[3] for petitioners claiming a violation of their constitutional rights by a person acting under color of state law. There is also a federal forum, via a petition for writ of habeas corpus pursuant to 28 U.S.C. §§ 2241 and 2254,[4] for

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3. Section 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

4. 28 U.S.C. § 2254(a) provides in full:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

continued . . .

prisoners claiming that they are being held in state custody in violation of their constitutional rights. This case requires the Court to evaluate the interplay of these two schemes in order to determine the issue characterized by one court as

> whether a state prisoner may challenge the validity of his conviction in a district court without having exhausted available state remedies upon the expedient of confining himself to a § 1983 claim for monetary damages, a declaratory judgment, and prospective injunctive relief, with a seemingly deliberate omission of a request for immediate release from his imprisonment.

Hamlin v. Warren, 664 F.2d 29, 30 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982).

A. Review of Prior Decisions Relied Upon by Petitioner.

Over two decades ago, this Court considered the intersection of § 1983 and § 2254 in *Preiser v. Rodriguez*, 411 U.S. 475 (1973). The Court first examined the scope and purpose of the writ of habeas corpus, and noted:

> [T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the

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4. *continued*

28 U.S.C. § 2241(c) provides in pertinent part:

> The writ of habeas corpus shall not extend to a prisoner unless [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . . .

> traditional function of the writ is to secure release from illegal custody.

Preiser, 411 U.S. at 484. Thus, the writ is an appropriate vehicle for a prisoner to claim "that he was denied his constitutional rights at trial." *Preiser*, 411 U.S. at 486 (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). The Court noted that habeas claims fall within the broad language of § 1983. *Preiser*, 411 U.S. at 489. It held, however, that habeas was the exclusive means a prisoner could use to challenge the fact or duration of his confinement, regardless of whether that challenge was to the constitutionality of his underlying state conviction and sentence, or was to the constitutionality of some state administrative action. *Id.*

The Court held that this result was mandated because the more specific habeas provisions required a prisoner to exhaust his available state remedies before seeking federal habeas relief. *Preiser*, 411 U.S. at 489. It noted that the exhaustion requirement relied upon by it and dictated by Congress served to insure federal courts show "a proper respect for state functions." *Preiser*, 411 U.S. at 491 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)). In the context of challenges to criminal convictions, it was designed "to avoid the unnecessary friction between the federal and state court systems that would result if a lower federal court upset a state court conviction without first giving the state court system an

opportunity to correct its own constitutional errors." *Preiser*, 411 U.S. at 490. Similarly, in the context of challenges to the actions of prison officials, it recognized that the state court system should be given "the first opportunity to correct the errors made in the internal administration of their prisons." *Preiser*, 411 U.S. at 492.

Although not presented with the issue, in *Preiser* this Court stated in dicta that a state prisoner seeking damages "is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy relief." 411 U.S. at 494. After briefly summarizing that habeas proceedings were inappropriate and unavailable for damages claims, this Court indicated that a state prisoner could bring a § 1983 action for damages without exhausting state remedies. *Id.*

This Court apparently applied the *Preiser* dicta in *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Wolff*, prisoners brought a § 1983 action claiming prison procedures resulted in the unconstitutional deprivation of good time credits, and seeking damages and injunctive restoration of their credits. 418 U.S. at 554. This Court held that the claim for restoration of good time credits was prohibited by *Preiser*, but that the prisoners could "go forward" with their damages claim. *Id.*

More recently, this Court considered the issue of whether a petitioner was required to exhaust available state administrative remedies before bringing a § 1983 action challenging her employer's dismissal of her. *Patsy v. Board of Regents*, 457 U.S. 496, 498 (1982). In evaluating the issue, the Court noted that legislative purpose is the paramount consideration in determining when exhaustion is required. *Patsy*, 457 U.S. at 501–02. After examining legislative history, this Court concluded that Congress had not intended petitioners to be required to exhaust administrative remedies in the context there presented. *Patsy*, 457 U.S. at 516.

Relying primarily upon these decisions, Petitioner argues in the present case that the type of relief sought is the dispositive issue in determining whether a prisoner must exhaust state remedies before challenging the validity of his state conviction. Petitioner admits that, pursuant to 28 U.S.C. §2254(b), a state prisoner must exhaust state remedies before he can challenge the validity of his conviction in a federal habeas proceeding. He contends, however, that this rule applies only where the prisoner asks for immediate or speedier release from custody. According to Petitioner, so long as the prisoner does not specifically ask for release—arguably the most logical and complete relief from an unconstitutional conviction—he is free to challenge the validity of his state

conviction in a § 1983 action without exhausting state remedies. Petitioner's claim, however, must be considered in a broader legal universe than the one relied upon in his brief. Instead, it must be evaluated in light of this Court's jurisprudence in both habeas and § 1983 contexts.

B. Federal Habeas Corpus.

1. *A state prisoner's access to federal court on habeas is governed by several limitations.*

The federal habeas corpus statute, 28 U.S.C. § 2254, permits federal collateral review of state court judgments for the sole purpose of determining whether the state prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). When a federal question is involved, a prisoner may directly challenge a state conviction via a petition for writ of certiorari. 28 U.S.C. § 1257. Once direct review is completed, however, "a presumption of finality and legality attaches to the conviction and sentence." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Thus, collateral review via federal habeas corpus exists only as a secondary and limited avenue to ensure that constitutional rights are observed. *Id.* The remedy "is designed to guard against extreme malfunctions in the state criminal justice systems." *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in

judgment). It is not designed to provide a federal forum to relitigate state trials. *Barefoot*, 463 U.S. at 887.

Over the years, this Court and Congress have established various requirements a state prisoner must satisfy before the federal court will exercise its equity jurisdiction and consider a collateral claim for a writ of habeas corpus from state custody. First, the prisoner must exhaust all available state remedies. 28 U.S.C. § 2254(b), (c);[5] *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (federal district court must dismiss habeas petition containing unexhausted claims). To satisfy this exhaustion requirement, the prisoner must comply with the State's procedural requirements and fairly present his claim to the State's highest court in a procedurally appropriate manner. *Coleman v. Thompson*, 111 S. Ct. 2546,

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5. Section 2254 provides in relevant part:

> (b) An application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted *unless it appears the applicant has exhausted the remedies available in the courts of the State*, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(Emphasis added).

2554–55 (1991); *see Castille v. Peoples*, 489 U.S. 346 (1989). The federal court will excuse him from this requirement only if he can demonstrate cause and prejudice for his procedural default, or that the failure to consider his claims will result in manifest injustice. *Coleman*, 111 S. Ct. at 2565. In addition, the prisoner must fully develop the relevant factual record before the state court. *Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1719 (1992) (prisoner not entitled to supplement factual record developed in state court unless he satisfies the cause and prejudice standard).

The prisoner must present in his first habeas petition all available claims he wishes to assert. 28 U.S.C. § 2254, Rule 9(b)[6]; *McCleskey v. Zant*, 499 U.S. 467, 489–96 (1991) (absent showing of cause and prejudice, federal court will dismiss a claim as an abuse of the writ if the prisoner could have urged it in a previous petition, but did not). As a general rule, a prisoner is not given the benefit of new constitutional rules

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6. Rule 9(b), Rules Governing Habeas Corpus Proceedings, provides:

> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, *if new and different grounds are alleged*, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

28 U.S.C. § 2254 Rule 9(b)(Emphasis added).

developed since his conviction became final. *Teague v. Lane*, 489 U.S. 288, 310 (1989). Finally, on collateral habeas review, a prisoner must establish that the claimed constitutional trial error actually prejudiced him,[7] while on direct review, the State bears the burden of establishing that the error was harmless beyond a reasonable doubt.[8] *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993) (habeas petitioner must prove the error "had substantial and injurious effect or influence in determining the jury's verdict").

2. *Limitations on habeas review serve important state and federal interests.*

This Court has enunciated many reasons for these limitations on the federal court's exercise of its equitable jurisdiction in habeas actions:

> The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the States' interest in the finality of convictions that have survived direct review within the state court system. We have also spoken of comity and federalism. The States possess primary authority for defining and enforcing the criminal law. In criminal trials they hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. Finally, we have recognized that liberal allowance of the writ degrades the prominence of the trial itself, and at the same time

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7. *See Kotteakos v. United States*, 328 U.S. 750 (1946).

8. *See Chapman v. California*, 372 U.S. 335 (1963).

encourages habeas petitioners to relitigate their claims on collateral review.

Brecht, 113 S. Ct. at 1720–21 (internal citations and quotations omitted); *see also Coleman*, 111 S. Ct. at 2554 (state procedural default rule prevents prisoners from doing "an end run around the limits of this Court's jurisdiction" by prohibiting claims precluded on direct review by adequate and independent state grounds); *Coleman*, 111 S. Ct. at 2564 (procedural default rule respects States' interest in their procedural rules, which are designed to "channel, to the extent possible, the resolution of various types of questions to the stage of the judicial process at which they can be resolved most fairly and efficiently" (quoting *Reed v. Ross*, 468 U.S. 1, 10 (1984)); *McCleskey*, 111 S. Ct. at 1468–69 (abuse of the writ doctrine promotes procedural regularity, recognizes that "'a suitor's conduct in relation to the matter at hand may disentitle him to the relief he seeks,'" (quoting *Sanders v. United States*, 373 U.S. 1, 17 (1963)), and takes into consideration the heavy burden federal collateral litigation places upon scarce federal judicial resources); *Teague*, 489 U.S. at 310 (prohibition against announcing new constitutional rule on collateral review prevents States from being continually forced "to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards); *Rose*, 455 U.S. at 518–20 (exhaustion

requirement "recognizes that State and federal 'courts [are] equally bound to guard and protect rights secured by the Constitution,'" (quoting *Ex Parte Royall*, 117 U.S. 241, 251 (1886)), "protect[s] the state courts' role in the enforcement of federal law," prevents unseemly federal court disturbance of state convictions before state courts have had a full opportunity to pass upon and correct any constitutional violations, encourages the development of a more complete factual record, and reduces piecemeal litigation).

C. § 1983 ACTIONS.

1. *Application of the Younger doctrine.*

Like habeas actions, § 1983 actions do not provide unlimited access to the federal courthouse. In *Younger v. Harris*, 401 U.S. 37 (1971), this Court held that a federal court should not enjoin a pending state criminal proceeding except under certain enunciated circumstances.[9] 401 U.S. at 41 (federal stay of ongoing state prosecution reversed because it violated "the national policy forbidding federal courts to stay or enjoin pending state court proceedings except under special circumstances"). That same day, the Court extended this rule by holding that, absent those same special

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9. The *Younger* doctrine of federal non-interference does not apply where the petitioner establishes that "the state proceeding is motivated by a desire to harass or is conducted in bad faith," or a statute being challenged is "flagrantly and patently violative of express constitutional prohibitions" in its entirety. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) (internal quotations omitted).

circumstances set forth in *Younger*, a federal court should not consider the merits of a claim for declaratory judgment regarding the constitutionality of a state statute at issue in an ongoing criminal proceeding. *Samuels v. Mackell*, 401 U.S. 66, 73 (1971) ("in cases where the state criminal prosecution was begun prior to the federal suit, . . . where an injunction would be impermissible under these [equitable] principles, declaratory relief should ordinarily be denied as well").

Since that time, the Court has extended the application of the *Younger* doctrine to § 1983 actions. For example, unless the petitioner satisfies the *Younger* exceptions, the federal court will abstain from considering his § 1983 claim for injunctive and declaratory relief until he exhausts his state appellate remedies in the already initiated state proceedings. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 609 (1975); *see* 420 U.S. at 605–06 (petitioner "should not be permitted the luxury of federal litigation of issues presented by ongoing state proceedings, a luxury which . . . is quite costly in terms of the interests which *Younger* seeks to protect"). The Court specifically distinguished this holding from prior decisions stating that the § 1983 petitioner need not first initiate state proceedings on related state claims, nor exhaust state judicial remedies in order to challenge an administrative action, by noting that those cases "did not deal with situations in which the state judicial process has been

initiated." *Huffman*, 420 U.S. at 609 n.21. Similarly, this Court held that a federal court should not consider a § 1983 action for injunctive relief from contempt proceedings where the petitioners "had an *opportunity* to present their federal claims in the state proceedings." *Juidice v. Vail*, 430 U.S. 327, 337 (1977) (emphasis in original, noting that "[n]o more is required to invoke *Younger* abstention").

2. *The limitations on § 1983 actions serve important state interests similar to those served by habeas limitations.*

As with its habeas jurisprudence, this Court has listed several reasons supporting the *Younger* abstention policy. Initially, the Court relied upon the doctrines of equity, comity and federalism. Pursuant to equity doctrines, "courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable belief." *Younger*, 401 U.S. at 43–44. Pursuant to comity, restraint from interfering in criminal prosecutions is supported by

> a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger, 401 U.S. at 44. In conjunction, the federalism concept promotes sensitivity to the States' legitimate interests, and endeavors to vindicate

federal rights and interests "in ways that will not unduly interfere with the legitimate activities of the States." *Id.*

In applying *Younger* to § 1983 actions and requiring petitioners to exhaust state appellate remedies before seeking § 1983 relief, the Court noted that

> "interference with a state judicial proceeding prevents the state . . . from effectuating its substantive policies, . . . [and] from continuing to perform the separate function of providing a forum competent to vindicate any constitutional objections interposed against those policies."

Huffman, 420 U.S. at 604. Moreover, the interference "results in duplicative legal proceedings, and can readily be interpreted 'as reflecting negatively upon the state courts' ability to enforce constitutional principles.'" *Huffman*, 420 U.S. at 604 (quoting *Steffel v. Thompson*, 415 U.S. 452, 462 (1974)). Thus, the Court did "not understand why the federal forum must be available prior to completion of the state proceedings in which the federal issue arises." *Huffman*, 420 U.S. at 606. The Court reiterated these reasons when dismissing a § 1983 action where the petitioners failed to avail themselves of available state remedies. *Juidice*, 430 U.S. at 334–37.

3. *§ 1983 relief is further limited by the doctrines of res judicata and collateral estoppel.*

The Court has also held that an additional limitation applies to § 1983 actions. Federal courts generally have "accorded preclusive effect to issues decided by state courts." *Allen v. McCurry*, 449 U.S. 90, 95 (1980). This rule "reduce[s] unnecessary litigation and foster[s] reliance on adjudication," and "promote[s] the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen*, 449 U.S. at 95–96 (citing *Younger*, 401 U.S. at 43–45). It also is required by Congress's mandate that the federal court give full faith and credit to state court judgments. 28 U.S.C. § 1738,[10] *quoted in Allen*, 449 U.S.

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10. 28 U.S.C. § 1738 provides in relevant part:

> The . . . judicial proceedings of any court of any State . . . shall have the same full faith and credit in every court within the United States and it Territories and Possessions as they have by law or usage in the courts of such State . . . .

at 96. Thus, collateral estoppel and res judicata principles[11] apply in § 1983 actions to preclude relitigation of issues decided in prior state criminal proceedings where the petitioner has had a full and fair opportunity to litigate the federal issue in state court. *Allen*, 449 U.S. at 101–04.

D. *YOUNGER* MUST BE APPLIED TO REQUIRE EXHAUSTION IN STATE PRISONER § 1983 ACTIONS THAT CHALLENGE THE FACT OR DURATION OF CONFINEMENT TO PREVENT CIRCUMVENTION OF THE HABEAS LIMITATIONS AND FRUSTRATION OF THE POLICIES UNDERLYING THOSE LIMITATIONS.

This Court has not yet reached the outer bounds of the application of the *Younger* doctrine to § 1983 claims. In *Juidice*, the Court stated in a footnote that it "intimate[d] no opinion as to the applicability of *Younger–Huffman* principles to a § 1983 action seeking only [damages] in the District Court." 430 U.S. at 339 n.16. Seven years later, the Court specifically noted that it has had "no occasion to decide if a Federal

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11. The Court has defined " res judicata" and "collateral estoppel" as follows:

> Under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.

Allen, 449 U.S. at 94 (citations omitted).

District Court should abstain from deciding a § 1983 suit for damages stemming from an unlawful conviction pending the collateral exhaustion of state-court attacks on the conviction itself." *Tower v. Glover*, 467 U.S. 914, 923 (1984). More recently, two Justices have stated that, under *Younger*, a federal court should abstain from considering a §1983 claim seeking monetary relief pending completion of the state criminal proceedings from which the claim arose. *Deakins v. Monaghan*, 484 U.S. 193, 208–10 (1988) (White, J. concurring). The Court itself, however, only stated in *Deakins* that it had no need to "decide the extent to which the *Younger* doctrine applies to a federal action seeking only monetary relief." 484 U.S. at 202.

If *Wolff* stands for the proposition that a state prisoner can avoid exhaustion requirements by challenging his conviction in a § 1983 action that seeks only monetary relief, there would be no explanation for this Court's repeated references to the fact that it was declining to consider the applicability of *Younger* principles to § 1983 damages claims arising from criminal prosecutions. Thus, the question must necessarily be an open one. The resolution of it requires an examination of the effect of the approach proposed by Petitioner.

Without an exhaustion requirement, a state prisoner may bring a claim for damages or declaratory judgment that requires the federal court

to evaluate issues not yet considered by the state courts involving the criminal investigation and prosecution, the resolution of which necessarily call into question the validity of the underlying conviction. For example, in this case, Petitioner asserts Respondents violated his constitutional rights by conducting an illegal search and illegal voice identification procedure, and by committing a *Brady*[12] violation in destroying evidence. For relief, he seeks a declaration that the criminal investigation was unconstitutional. He also seeks compensatory damages for the income losses caused by his confinement, and punitive damages. To grant Petitioner's compensatory damages request for losses resulting from his confinement, the federal court must necessarily determine that Petitioner's confinement is wrongful. Moreover, while consideration of the punitive damage and declaratory judgement claims does not require the federal court to necessarily conclude that the conviction is wrongful, it too calls the validity of the conviction into question.

If a prisoner's claims were previously presented in the state court during the criminal prosecution, and were decided adverse to the prisoner, presumably the doctrine of collateral estoppel will prevent that prisoner from relitigating those claims in a subsequent § 1983 action. If the claims

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12. *Brady v. Maryland*, 373 U.S. 83 (1963).

were not litigated in the prior proceedings, or are of the type appropriately brought only in post-conviction proceedings that the prisoner has not yet pursued because he has not been required to exhaust state remedies, the prisoner may argue that there is no state judgment to which estoppel may apply. Thus, he avoids the estoppel effects of having the state court consider the issue in the first instance.

The state prisoner also escapes the habeas limitations by challenging his conviction in a § 1983 action. A prisoner successfully avoids the exhaustion requirements of *Rose* and *Coleman* if he is not required to exhaust his state remedies. Because this Court has had no occasion to determine whether *Teague* applies in this circumstance, a prisoner will be free to urge the federal court to develop a new constitutional rule entitling him to relief. Moreover, because this is not technically a habeas action, he will also be free to argue that the *McCleskey* abuse of the writ doctrine is inapplicable, entitling him to bring successive § 1983 actions raising additional claims, bound only by the statute of limitations. The prisoner, having not exhausted his claims in state court, will also presumably be free to develop his factual record in federal court, thus avoiding *Tamayo-Reyes*. Additionally, the prisoner may ignore *Brecht* and argue that the court should apply the *Chapman* rather than *Kotteakos* standard to determine whether any constitutional error was harmless.

Depending upon the extent to which a prisoner's claims have already been litigated in state court, the federal court may reach the merits of some of the prisoner's claims, and decide them in his favor. If the federal court actually determines that the prisoner has been wrongfully convicted, it may deem it appropriate to order his release from custody. *See Samuels*, 401 U.S. at 72 (indicating that district court might grant an injunction as further necessary relief to effectuate a declaratory judgment, pursuant to 28 U.S.C. §§ 2202 and 2283). If it does so, the prisoner has successfully manipulated the system to gain release—the traditional function of habeas corpus—without satisfying the exhaustion requirement or being bound by the other limitations to habeas. Such a result is clearly contrary to *Preiser*, and congressional intent.

If the federal court does not order his release as part of the relief in his § 1983 action, a prisoner may trot into state court and raise the very claims he has just litigated in the federal forum, his successful § 1983 judgment in hand. The state court is then faced with a number of possibilities. If res judicata applies, the State court will be forced to agree with the federal court's conclusion, find that the conviction is invalid, and release the prisoner. Once again, the petitioner has successfully gained release while avoiding *Preiser* and § 2254.

This is the result the concurrence anticipated and sought to avoid in *Deakins*. In *Deakins*, petitioners, some of whom were under state criminal indictment and some whom were only under state criminal investigation, brought a § 1983 action seeking, among other things, damages based upon several police officers' execution of a search warrant. 484 U.S. at 205 (White, J., concurring). In his concurrence, Justice White, joined by Justice O'Connor, held that *Younger* required the district court to refrain from deciding the damages claim "until the conclusion of the pending state criminal proceedings." *Deakins*, 484 U.S. at 208–10. Justice White explained his decision as follows:

> As the *Younger* decision itself recognized, it has long been the rule that the federal courts should not interfere with or pre-empt the progress of state criminal proceedings. A judgment in the federal damages action may decided [sic] several questions at issue in the state criminal proceeding. It may determine, for example, that certain evidence was seized contrary to the Fourth Amendment, or that an interrogation was conducted in violation of the Sixth Amendment, or that Fifth Amendment rights were somehow violated. In fact, in this case, such claims —and many more—are all being pressed by respondents in their § 1983 action. If the claims the Court remands today were disposed of on the merits by the District Court, this decision would presumably be owed res judicata effect in the forthcoming state criminal trial of respondents. The potential for federal–state friction is obvious.

Deakins, 484 U.S. at 208 (internal citations and quotations omitted).

Petitioner argues that res judicata will not bind the State to the federal court's § 1983 judgment because the State is not technically a party to the § 1983 action.[13] Assuming Petitioner's assertion is correct, the state court has nevertheless been deprived of the opportunity to rule in the first instance on constitutional issues affecting the validity of the conviction or, as in this instance presented by Petitioner's claims, on the very validity of the conviction itself. This usurpation of the issues by the federal court interferes with the States' efforts to effectuate their substantive policies, and frustrates their attempts to exercise their sovereign power in the administration of their criminal justice system. It also reflects negatively on the states' court systems, because it creates the appearance that the state court was unwilling or unable to consider a prisoner's constitutional claim.

The state court, faced with the federal determination of the very questions now before it, may feel pressured to accept the federal court's conclusions, even if res judicata did not force it to do so. If it follows the federal court's decision, the prisoner has avoided the *Preiser* and § 2254 exhaustion requirement, yet gained release. If the state court does not follow the federal court's decision, the prisoner, having now exhausted his state remedies, can then bring a federal habeas action before the very court

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13. It is not necessary for this Court to decide that issue to reject Petitioner's overall approach.

that has already decided that his conviction is invalid. It is unlikely that court will reach a contrary conclusion the second time around, and the prisoner once again secures release without having given the State the opportunity to rule on the claim in the first instance.

Regardless of the exact scenario followed, the result is consistently the same. If a prisoner is not required to exhaust his state remedies before bringing a § 1983 action raising issues that call into question the validity of his conviction—the fact or duration of his confinement—no matter what forms of relief he directly requests in that § 1983 action, he may use that federal ruling to eventually obtain release. He will also avoid the other limitations of habeas. This type of end run around habeas procedures cannot be permitted. If this Court accepts Petitioner's approach, state prisoners assuming that the federal forum will be more friendly will be able to frustrate *amici's* and other States' interest in the orderly administration of their criminal justice system, and their good faith attempts to exercise their sovereign power to punish criminal offenders while honoring constitutional rights. This does not show a proper respect for the States, and will necessarily create friction with the federal courts. It is also contrary to Congress's intent, clearly indicated in § 2254(b), and this Court's habeas jurisprudence.

Because of the potential that a successful § 1983 judgment will be used to gain release, this Court should require a state prisoner raising claims based upon the criminal investigation and prosecution underlying his conviction to exhaust available state remedies for challenging his conviction to the same extent that he would be required to do before bringing a habeas action. Because of the estoppel doctrine, the prisoner will generally be bound by the state court's determination of the merits of his claims. This rule will ensure the prisoner does not also circumvent the other habeas limitations. Because claims will not be relitigated in the § 1983 action, the prisoner will have no occasion to argue that a new constitutional rule should be applied. Moreover, there will be no need to supplement the factual record unless the prisoner has been successful on a claim in state court. If so, the factual record may be supplemented to the extent needed to determine damages or other relief. This supplementation, however, will not be considered to determine the merits of the claim, because the state court will have already ruled on that. Moreover, the state court will have already determined whether the alleged constitutional error was harmless, thus not calling into question what harmless error standard the federal court should apply. Finally, the prisoner will have no motivation to bring successive § 1983 actions raising new claims, because he will already know

which claims will entitle him to relief—only those claims he succesfully urged in state court.

To ensure the orderly administration of justice, protect the States' interest in the enforcement of their criminal laws, and prevent circumvention of the limitations on habeas actions and the consequent frustration of all the concerns requiring those limitations, this Court should apply the *Younger* doctrine to state prisoners' § 1983 actions that raise issues effecting or calling into question the validity of their state conviction, and hold that a federal court will not consider the action, regardless of the type of relief being sought, until the prisoner exhausts available state remedies to challenge the underlying conviction.

CONCLUSION

While habeas corpus and § 1983 necessarily intersect, this Court has held that habeas is the exclusive way by which a state prisoner may challenge in federal court the fact or duration of his confinement. Additionally, this Court and Congress have imposed limitations on when the federal court will consider the merits of a habeas claim. Petitioner asks this Court to adopt an analysis that would enable state prisoners to raise habeas issues in federal court without satisfying the requirements limiting habeas. The prisoner need only manipulate the system by labeling his action "1983" and not including in it a request for habeas relief—release

or a reduction in sentence. He may then use his § 1983 judgment to seek and obtain the very relief claim he omitted from his § 1983 action—release or a reduction in sentence. Such a result offends the very principles and concerns that led to the development of the *Younger* doctrine and limitations on habeas in the first place. This Court should therefore require a state prisoner to exhaust available state court remedies for challenging the validity of his conviction before the federal court will consider his § 1983 action based upon a challenge to the criminal investigation and prosecution leading to his conviction.

Respectfully submitted,

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